UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NETCHOICE, LLC, ET AL	)	Docket No. A 21-CA-840 RP
	)	
vs.	)	Austin, Texas
	)	
KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS	)	November 29, 2021

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ROBERT L. PITMAN

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08:59:48 THE CLERK: Court calls: A 21-CV-840, NetChoice LLC and Others vs. Ken Paxton.

08:59:53 THE COURT: And announcements for the record, please.

08:59:56 MR. KELLER: Your Honor, Scott Keller for the plaintiffs. I also have at counsel table my colleagues, Steve Lehotsky, Matt Frederick and Todd Disher.

08:59:57 THE COURT: Good morning.

09:00:02 MS. CORBELLO: Good morning, your Honor.

09:00:06 Courtney Corbello for defendant. I also have Ben Lyles and Ben Walton with me from the Attorney General's Office.

09:00:08 THE COURT: Good morning. Thank you very much for being here.

09:00:10 I would ask that as a matter of protocol, that if you would both participants, spectators wear masks unless you are in a speaking role. Feel free to remove your mask -- while we're still in a time of some concern and a little uncertainty now that there seems to be a new variant, and so, we're trying to be as responsible as we can, minimizing the risk to all participants. So I'd appreciate that.

09:00:11 Second, it's my understanding that there has been an agreement among the parties with regard to how you want to use your time today. Mr. Keller, can you tell me what

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09:00:57 discussions have been?

09:00:59 MR. KELLER: Yes. The parties have agreed that we will each have one hour of time, and then, we will be able to reserve rebuttal time among that hour.

09:01:07 THE COURT: Okay. Ms. Corbello, does that sound right?

09:01:10 MS. CORBELLO: Yes, your Honor. That's correct.

09:01:11 THE COURT: Okay. Very good. And then, Mr. Keller, would you like to take the floor then?

09:01:24 MR. KELLER: Thank you, your Honor. May it please the Court.

09:01:39 House Bill 20, Section 2 and 7, are unconstitutional in all sorts of ways under the First Amendment and the commerce clause. Section 7 of House Bill 20 is also preempted by the Communications Decency Act, 47 U.S.C. 230. The First Amendment interests here are a wide array of doctrines at every turn protecting social media platforms' dissemination of speech. These are inherently expressive products. Websites themselves are inherently expressive. Under the First Amendment, a whole host of cases that the defendant ignores, Hurley, Tornillo, Pacific Gas, all hold that platforms retain editorial discretion over the speech that they will disseminate from others. Compelled speech is not allowed by our First Amendment.

09:02:41 And yet, House Bill 20's Section 7 and Section 2 both would compel speech and pierce into the editorial discretion that covered social media platforms have. Now, the defendant also says that somehow, the internet is different. The Supreme Court, a generation ago, in Reno vs. ACLU, another case which defendant ignores, said the exact opposite, that full First Amendment protection applies on the internet. And this is not some abstract debate.

09:03:14 The defendant does not dispute, at least does not seem to or won't take a position, that Section 7's text which prohibits censoring, that is, content moderation or even changing displays based on viewpoint, would require social media platforms to disseminate pro-Nazi speech, medical misinformation, terrorist propaganda, foreign government disinformation, indeed, holocaust denial. This is a striking assertion of government power. And not only does this infringe on First Amendment-protected editorial discretion and compelled speech, there is also a content-based, indeed, viewpoint-based in Section 7, any speaker-based law, all of which trigger strict scrutiny.

09:04:02 And when you get to the strict scrutiny analysis, the defendant has posited two interests, both of which the Supreme Court has already rejected. And at the end of the day, the state had an obvious alternative here which shows

09:04:16 that this law is not at all properly tailored. The state could have created its own government-run true public forum that is government property that was a social media platform run by the state.

Indeed, the legislature voted on that and rejected it and, instead, passed House Bill 20, burdening the rights of private entities disseminating speech on expressive websites. In addition, Section 230 and binding Fifth Circuit precedent clearly provides that liability cannot be imposed by a state on the basis of screening, monitoring, or deleting content -- that's Doe vs. MySpace -- and yet, that's exactly what Section 7 does.

The commerce clause arguments here, defendant does not dispute that this would require social media platforms to continue operating in Texas, even if they would rather cease operations in Texas. That's a blatant commerce clause violation. Also, this law is not just limited to Texas users because the effect of this law gives Texas users a right not only to post but, also, to receive content that is not moderated on the basis of viewpoint. This requires worldwide dissemination of speech.

So, your Honor, today, I'd like to walk through a little bit more detail these doctrines, but as an overview, this law's unconstitutional on all sorts of

09:05:41 ways. It's preempted and the irreparable harm as the
09:05:46 Supreme Court and Fifth Circuit have noted from the loss
09:05:48 of First Amendment freedoms for even a small amount of
09:05:50 time is unquestionably irreparable harm. The irreparable
09:05:55 harm, the public interest factors, they all collapse back
09:05:58 into the merits analysis here when we're talking about
09:05:59 core First Amendment-protected freedoms.
09:06:02 THE COURT: Mr. Keller, if I could ask you, I'm
09:06:04 sure this is something you would contemplate addressing
09:06:06 later in your comments. But just to set the stage,
09:06:08 because I think it's relevant to everything that we're
09:06:11 going to talk about today, can you elaborate a little bit
09:06:14 on this idea of sort of the editorial function of your
09:06:17 client or your clients' members. It seems to me that
09:06:22 that's something that I really need to understand what
09:06:26 that function is and how it's distinct from -- whether it
09:06:30 is or isn't speech by -- especially protected by the First
09:06:36 Amendment.
09:06:36 You know, the response of the state to your
09:06:42 motion, the initial sort of position was sort of these
09:06:49 folks are trying to have it both ways. On one hand, they
09:06:52 -- in the context where it benefits them, they say we're
09:06:55 simply a platform where we facilitate speech for other
09:06:59 people, and they use that position to insulate themselves
09:07:02 from certain liability for certain kinds of speech.

09:07:06 But then, sort of they want to have it both ways in the context like this to say that, oh, but this editorial function is actually speech. And so, we need the protections when we want them, but we want to sort of be insulated from liability when we -- it serves us not to describe our function as speech. Can you unpack that a little bit for me?

MR. KELLER: I'd be happy to, your Honor. And there's no having it both ways here. Social media platforms disseminate speech. The Fifth Circuit's Doe vs. MySpace ruling, I, think, is very clear about this. That's Section 230. There's no having it both ways. What Doe vs. MySpace said was monitoring, screening and deleting content is quintessentially a publisher's role. Now, Section 230 says the liability can't be imposed on that basis, but there's no having that both ways.

If websites were somehow not expressive, maybe this would be very different; but Reno vs. ACLU, a generation ago, said that they are. Also, many of these covered platforms have been very clear. They do, in fact, have hate speech policies. There's no time have social media platforms said that they are just dummy conduits passing on all speech come through. They've been very clear about that. In fact, there's this mismatch between the purpose and the justification of House Bill 20. On

09:08:32 one hand, the purpose is, well, all of these users are
09:08:36 being treated differently because social media platforms
09:08:39 exercise content moderation at times; and yet, then, the
09:08:43 justification is somehow, well, social media platforms are
09:08:45 treating everybody the same and that's why they can be
09:08:47 deemed a common carrier, to be very clear about this.
09:08:50 Common carriers retain First Amendment rights.
09:08:53 Regardless, social media platforms are not common
09:08:55 carriers.

09:08:56 And to come to your Honor's questions about the
09:08:59 editorial function itself that is taking down content or
09:09:04 placing content in a different view, which is something
09:09:08 that the defendant doesn't want to focus on, but there's
09:09:10 no way that a social media platform can take all of the
09:09:12 user-submitted content and put it on one computer screen
09:09:15 at the same time. That's impossible. And yet, there's
09:09:17 this requirement of equal access, which I'm not even sure
09:09:21 how you would practically implement that.

09:09:23 But regardless, what Denver Area from the Supreme
09:09:27 Court said -- and I think this put it best in summarizing
09:09:29 this line of cases from Tornillo and Hurley and Pacific
09:09:32 Gas. It said the editorial function itself is an aspect
09:09:35 of speech and so, even if a social media platform itself
09:09:40 is not generating the speech. Hurley also confirms that
09:09:45 it doesn't have to be generated as an original matter,

09:09:48 it's still protected. And it's still protected even if
09:09:51 there's not a particularized message, even if a platform
09:09:54 is lenient in allowing speech to be disseminated.
09:09:58 THE COURT: What if the curation of that, of the
09:10:01 third-party speech is driven by commercial considerations,
09:10:07 rather than the particular viewpoint of the message?
09:10:13 Because it seems obvious that most, if -- some, if not
09:10:20 most, of the editorial sort of function is performed by
09:10:27 algorithm, and it's based on what's going to drive the
09:10:34 user's interest in the site and to -- and doesn't that
09:10:39 seem a lot more commercial than expressive? It's
09:10:42 expressive, but in terms of sort of the fact that it's
09:10:44 done by algorithm, doesn't that sort of undercut sort of
09:10:50 the First Amendment interests of your client?
09:10:53 MR. KELLER: No, not at all, your Honor. And
09:10:55 I'll take those in order. I'll take commercial speech and
09:10:58 then, algorithms.
09:10:58 So first of all, with commercial speech, the
09:11:00 commercial speech doctrine is very narrow. A profit
09:11:04 motive does not strip communications of First Amendment
09:11:07 protection. That's the Fifth Circuit and the Supreme
09:11:08 Court for quite some time. So I think it's important when
09:11:10 we're talking about commercial speech to focus on exactly
09:11:13 what that doctrine would entail. And what that doctrine
09:11:15 entails is either -- the broadest definition is expression

09:11:18 related solely to the economic interests of the speaker
09:11:21 and audience. That clearly doesn't pertain because social
09:11:26 media platforms distribute all sorts of speech.
09:11:27 This would be very fatally overbroad, even if the
09:11:29 state could point to an exact example of, say, a proposal
09:11:33 of a commercial transaction. So the commercial speech
09:11:36 doctrine doesn't apply. A profit motive or wanting viewer
09:11:40 engagement or fostering a community in presenting a
09:11:44 message of this is the speech that platform says is worthy
09:11:46 of presentation, to quote Hurley, that's all squarely
09:11:49 protected.
09:11:49 Now, to terms of the algorithms, first of all,
09:11:53 using technology to engage in First Amendment-protected
09:11:55 editorial discretion doesn't change the First Amendment
09:11:58 analysis whatsoever. All the courts that have considered
09:12:01 this have held that. That's our preliminary injunction
09:12:04 motion at page 17, collecting cases that, also, the
09:12:08 Northern District of Florida's opinion in joining similar
09:12:10 Florida law held the same, regardless. Humans program the
09:12:15 computer algorithms that are enforcing the content
09:12:19 moderation policies. Also, just to put this -- just view
09:12:24 the scale of what social media platforms actually do. We
09:12:28 are talking about billions of pieces of content.
09:12:32 For instance, this is in our declaration number
09:12:37 three from YouTube at paragraph 56: In quarter two of

09:12:42 2020 alone, so three months this year, YouTube removed 9.5
09:12:46 million videos and over 1.16 billion, with a B, comments.
09:12:54 The scale on which House Bill 20 and the defendant's
09:13:00 position that somehow algorithms take this out of First
09:13:03 Amendment protection would be -- it's staggering. This is
09:13:07 just another example of how this bill is designed to
09:13:11 destroy and to limit what social media platforms can
09:13:19 actually be doing.
09:13:19 So whether we're talking about editorial
09:13:22 discretion and all of the protection it gets -- Manhattan
09:13:26 Community from the Supreme Court recently said the private
09:13:28 entities' rights to exercise editorial control over speech
09:13:30 and speakers on their properties or platforms is
09:13:34 protected.
09:13:40 If I can then turn to -- and that is our primary
09:13:43 argument, by the way. Editorial discretion, no matter
09:13:45 even if this was a content-neutral law, First Amendment
09:13:48 protects that. But it gets worse for the defendant
09:13:54 because this is a content- and speaker-based law. Indeed,
09:13:56 it's a viewpoint-based law. And I want to tackle this
09:13:58 point head on because there's some dispute in the briefing
09:14:02 about what viewpoint means and what viewpoint-based versus
09:14:07 content-based means.
09:14:08 So what the Fifth Circuit in Robinson said,
09:14:11 citing the Supreme Court's Mattel decision, is that if

something is a subjective judgment that the content of protected speech is offensive or inappropriate, that is a viewpoint-based judgment. In other words, if the judgment is, this is speech that's offensive or inappropriate, therefore, social media platform doesn't want to disseminate it, that's viewpoint-based. This goes back to the Supreme Court's decision in R.A.V. vs. City of St. Paul, which found a hate speech policy to be viewpoint-based.

So under the plain text of House Bill 20, the term "viewpoint" if it means what the Supreme Court and Fifth Circuit say it means, then anytime a social media platform enforces a hate speech policy, that's a judgment that speech is offensive and inappropriate, that's a viewpoint-based determination, and Section 7 says covered platforms can't do that. Now, defendant's brief tries to say that, well, that's some aspects of it. At least racism, for instance, might be viewpoint.

Now, they don't take a position on holocaust denial. They don't take a position on pro-Nazi speech. They don't take a position on misinformation. I would assume they're going to concede that that is all prohibited viewpoint discrimination, but I'll let the defendant speak for himself. Regardless, we've given examples in our reply brief of even if, first of all,

09:15:29 racism is hate speech, it is viewpoint-based. But even if
09:15:32 we're wrong about that, there's all sorts of other content
09:15:35 moderation that platforms would want to do. And so, in
09:15:37 some ways, this debate about what precisely the line is
09:15:41 between viewpoint and content moderation, in some ways,
09:15:44 doesn't matter because whenever House Bill 20 would
09:15:47 prohibit viewpoint-based editorial discretion, that's
09:15:53 unconstitutional.
09:15:55 The reply brief, we gave examples of speech that,
09:15:57 you know, a terrorist organization, ISIS, is better than
09:16:01 America. That's a viewpoint, it's a political viewpoint.
09:16:05 House Bill 20 says social media platforms have to
09:16:07 disseminate that. We also gave examples of the content of
09:16:10 a terrorist video, an ISIS video, or even an Adolf Hitler
09:16:14 speech. That content in some contexts, platforms
09:16:18 absolutely may want to moderate and not have to
09:16:20 disseminate, but in other contexts about newsworthy or
09:16:24 educational events, maybe they want to, but this also
09:16:27 shows why this is viewpoint-based.
09:16:29 House Bill 20 is also content-based because it
09:16:32 has three different exceptions. It doesn't include
09:16:35 websites that are primarily of news, sports and
09:16:38 entertainment. That's a content-based exception that
09:16:41 triggers strict scrutiny. Also, this is a law that
09:16:45 singles out a small number of entities for onerous

09:16:51 treatment. The Fifth Circuit has said that's inherently
09:16:53 suspect. That's the Time Warner case. This bill only
09:16:55 targets social media platforms with only 50 million active
09:16:59 U.S. users per month. So it excludes some social media
09:17:02 platforms, like Parler and Gab and Gettr. It includes
09:17:07 Facebook, YouTube, Pinterest, TikTok, and all sorts of
09:17:12 others. Drawing that line and disfavoring treatment for a
09:17:16 small set of entities is inherently suspect under the
09:17:19 First Amendment.

09:17:20 Your Honor, I mentioned before, the defendant has
09:17:24 posited two interests here and neither is sufficient. The
09:17:29 first interest they've posited is that there is a supposed
09:17:33 government interest in the free flow of information among
09:17:36 the public forums that are common carrier social media
09:17:40 platforms. This is wrong in at least two ways. First of
09:17:43 all, private platforms are not public forums. Private
09:17:48 platforms are not government speech. I'm sorry, are not
09:17:50 government property.

09:17:52 The public forum analysis is limited to when
09:17:57 government places restrictions on the use of its property
09:18:02 that's Krishna. The Arkansas Education case said the
09:18:05 public forum analysis is limited to the historic confines
09:18:08 of what has been held in public trust. In other words,
09:18:12 the public sidewalk, the public square. Social media
09:18:15 platforms are privately owned. They have never been held

09:18:18 in trust for the public.

09:18:23 Even if putting that aside that maybe the
09:18:26 defendant wants to take back its label of public forum,
09:18:29 turning to common carrier. Common carrier labels are
09:18:33 irrelevant to the First Amendment analysis, and we know
09:18:35 this from Pacific Gas, Denver Area and Turner. Pacific
09:18:42 Gas involved a state-sanctioned monopoly common carrier,
09:18:46 and the Supreme Court vindicated that common carrier's
09:18:49 First Amendment rights to not disseminate other speech
09:18:53 through its own platform. Denver Area held cable
09:18:57 operators retain editorial discretion over the freedom to
09:18:59 pick and choose cable programming.

09:19:01 Turner recognized that cable operators also had
09:19:06 First Amendment rights, which is exactly why First
09:19:08 Amendment heightened scrutiny applied. Now, there, that
09:19:11 was a content-neutral law, which is why only intermediate
09:19:16 scrutiny applied. Of course, here, we have a
09:19:17 content-based law. Also, that was a very unique fact
09:19:19 pattern where the law required carrying just a minimum
09:19:22 number of broadcast television channels. So we're not
09:19:25 talking about all comers. We're not talking about all
09:19:27 channels. And there was also a physical bottleneck from
09:19:31 the physical cable that needed to be laid to be able to
09:19:33 operate those systems that would have destroyed an entire
09:19:37 speech medium that is free broadcast TV, that was the only

09:19:40 1 television that 40 percent of Americans had, and the Fifth
09:19:44 2 Circuit's been clear that's the limits of the Turner
09:19:46 3 holding.
09:19:47 4 If there were any doubt about it, Reno vs. ACLU
09:19:51 5 said that this broadcast-specific television analysis has
09:19:54 6 no place on the internet. That's 512 U.S. at 868 to 69.
09:19:59 7 So when you have Pacific Gas and you have Turner and you
09:20:02 8 have Denver Area on the books, Justice Thomas in his
09:20:05 9 separate opinion in Denver Area was absolutely right.
09:20:08 10 Labeling a law, quote, a common carrier scheme has no real
09:20:11 11 First Amendment consequences, unquote.
09:20:15 12 Put it slightly different, to quote Hurley,
09:20:19 13 government cannot declare expression dissemination as a
09:20:22 14 public accommodation that, therefore, can be coopted by
09:20:26 15 the government. Even if the defendant was to try to
09:20:28 16 package this into a, well, we want to make sure that
09:20:31 17 certain voices are heard more, that itself in a score of
09:20:36 18 Supreme Court cases is not a sufficient governmental
09:20:38 19 interest to override First Amendment rights. That's
09:20:40 20 Buckley vs. Valeo, and Tornillo, and Hurley, and Pacific
09:20:45 21 Gas. Leveling is not a sufficient government interest.
09:20:47 22 That's Arizona Free Enterprise.
09:20:49 23 So the only interest, then, that the defendant is
09:20:52 24 left arguing is the second interest they bring up, which
09:20:55 25 is a general interest in antidiscrimination laws. But the

09:20:59 Supreme Court in Hurley squarely rejected that, saying
09:21:02 that forbidding acts of discrimination among expressive
09:21:04 viewpoints is, quote, a decidedly fatal objective,
09:21:08 unquote, for the First Amendment's free speech commands.
09:21:12 That is not a sufficient basis on which government can
09:21:14 compel speech and pierce into editorial discretion.
09:21:17 Now, your Honor, let's say they can clear the
09:21:19 interest. Let's say they have some sufficient
09:21:22 governmental interest. We think strict scrutiny applies.
09:21:25 But even if exacting scrutiny or intermediate scrutiny
09:21:30 applies, the law still would have to be properly tailored
09:21:32 and it's not. And we know that because the state could
09:21:35 have created its own government-run social media platform.
09:21:38 The legislature rejected doing that.
09:21:40 Also, this isn't tailored at all. When House
09:21:44 Bill 20 size cut off to 50 million monthly users, that's
09:21:48 not at all tailored to the interest they're saying. If
09:21:50 they actually would have an interest in, you know,
09:21:53 disseminating as much speech as possible on
09:21:55 antidiscrimination, then why does this only apply to the
09:21:57 biggest social media platforms out there? To be clear, if
09:21:59 this were applying to all social media platforms, we still
09:22:03 believe that's unconstitutional as an infringement of
09:22:05 editorial discretion, but that just shows the many ways in
09:22:08 which the law is invalid.

09:22:10 Your Honor, if I can turn to the disclosure and
09:22:13 operational requirements because I think it's very
09:22:16 important that Section 2 not be lost in the debate.
09:22:19 Section 7, of course, is the provision that says you can't
09:22:22 do viewpoint-based content moderation. Section 2, though,
09:22:24 has a slew of onerous operational and disclosure
09:22:28 requirements. I also want to be clear about our position
09:22:30 on this.
09:22:30 Our position is that strict scrutiny or at least
09:22:35 exacting scrutiny, the same level that would apply in the
09:22:37 campaign finance disclosure context should apply because
09:22:41 this, too, burdens the exercise of editorial discretion.
09:22:45 It compels speech, it's also content-based. For all
09:22:50 reasons I just mentioned, there's no sufficient government
09:22:52 interest. This isn't tailored.
09:22:53 Just because it doesn't outright ban expression,
09:23:00 it absolutely still burdens it. And we know from the
09:23:03 Playboy case, and Sorrell case, and Herbert vs. Lando that
09:23:07 you can burden First Amendment rights just like you can
09:23:09 even if you were just prohibiting. But let's say we're
09:23:12 even wrong about strict scrutiny or exacting scrutiny
09:23:15 applying, at minimum, the intermediate scrutiny that would
09:23:19 apply in the commercial speech doctrine should apply.
09:23:22 Now, we talked about before, the commercial speech
09:23:23 doctrine doesn't apply.

09:23:24 So again, this is a backup to a backup argument. But finally, as a backup to that third backup argument, only then would the Court reach the Zauderer or NIFLA test of whether these requirements are only purely factual, noncontroversial, or unduly burdensome. So again, your Honor, we don't believe that you have to reach that test. We've made the arguments because these are very unduly burdensome. But I think the state would have to satisfy strict scrutiny or at least exacting scrutiny before you even get to that.

09:23:56 But let's assume, your Honor, that you would get to are these only purely factual, noncontroversial and unduly burdensome. These are very burdensome. The un-rebutted evidence that we cited in our reapply brief is, these are going to require global changes to the platforms' operations and completely redoing how editorial discretion is performed. All of these algorithms that the various companies have spent years not only putting all sorts of resources into, but tailoring to provide their expressive communities and disseminating speech that they deem is worthy of presentation.

09:24:31 I mean, imagine that there had been a slew of these disclosure requirements for bookstores, or art shows, or comedy clubs, or cable TV operators picking their stations, newspaper op-ed boards. That is an

09:24:45 incredible intrusion into the exercise of First Amendment
09:24:48 rights. But I'd like to go provision by provision just so
09:24:53 your Honor has directly in front of you how these
09:24:57 provisions are so onerous. I'm going to start with the
09:24:59 notice complaint and appeal process. This is Business and
09:25:03 Commerce Code 120.101 to 104.
09:25:08 These provisions would require social media
09:25:11 platforms to give a notice and explanation each time they
09:25:15 remove content. Each time. Now, we're talking about all
09:25:18 content. Mentioned before, our declaration three,
09:25:23 paragraph 56 from YouTube. YouTube removed in three
09:25:27 months this year, again, 9.5 million videos and 1.16
09:25:32 billion comments. What this provision says is, in each of
09:25:37 those instances, over a billion times, over a three-month
09:25:41 period, every single time, YouTube would have had to
09:25:44 provide notice to every single one of those users and an
09:25:47 explanation about why that content was being taken down.
09:25:51 Over one billion times. That is a massive, massive
09:25:55 infringement on First Amendment rights.
09:25:58 And that's not all. Then there's a complaint
09:26:03 procedure that's required; and then, the social media
09:26:05 platforms have to within 48 hours process these user-based
09:26:08 complaints. That's going to be effectively a heckler's
09:26:11 veto. If an individual complains about it and they have
09:26:14 this scale of complaints, what's a social media platform

09:26:17 supposed to do if they're going to have to process this
09:26:19 within two days? After that, then there's an appeal
09:26:21 process that they're supposed to resolve in two weeks.
09:26:24 And then, they have to provide a notice of that decision
09:26:27 and reasons for any reversal. I don't know how big of a
09:26:33 legal department and a compliance department you need to
09:26:35 do this, but we have testimony, including from Facebook --
09:26:39 this is the Potts deposition -- it would be impossible to
09:26:41 comply with this three days from now, which is when House
09:26:44 Bill 20 is supposed to take effect. So that's the notice
09:26:47 complaint and appeal process.
09:26:48 Go to the public disclosure provision. This is
09:26:51 120.051. Social media platforms are required to publish,
09:26:56 quote, information regarding content management, data
09:27:00 management and business practices, unquote. That's the
09:27:03 requirement. They have to publish business practices.
09:27:07 What does that mean? Well, the statute doesn't tell you.
09:27:11 What it says is then there's a non-exhaustive list
09:27:14 including how a platform curates content, places content,
09:27:19 moderates content, its algorithms, which are most likely
09:27:23 trade secrets, and performance data.
09:27:24 Again, this is an incredible intrusion on
09:27:27 editorial discretion, and it's going to give bad actors a
09:27:30 roadmap to evade whatever editorial discretion could
09:27:33 possibly be left by some of the exceptions that House Bill

09:27:36 20 carves out in its content-based manner.

09:27:38 I'll turn to the publishing acceptable use

09:27:42 policy. This is 120.052. This requires social media

09:27:46 platforms to reasonably inform users about the types of

09:27:50 content allowed and explain the steps that they ensure

09:27:53 compliance. Now, look, this might not sound as bad as

09:27:56 some of the other provisions, but what does reasonably

09:27:58 inform mean? What exact steps are supposed to be taken?

09:28:03 This is vague and it also invites arbitrary enforcement.

09:28:08 It would be one thing if the defendant were

09:28:09 saying, we believe that all covered social media platforms

09:28:12 are complying with this, and we're not going to enforce

09:28:15 this in a way that would, you know, be an onerous burden.

09:28:18 So, you know, yeah, we're -- we have not heard that from

09:28:23 the defendant. And I'm not sure the defendant today is

09:28:25 going to disavow enforcement of this law. But otherwise,

09:28:28 even under the NIFLA test, these editorial policies are

09:28:31 not factual. They're not noncontroversial. These are

09:28:35 judgments, not facts. Also, this is a lot more than just

09:28:38 a few lines of text, like in NIFLA. And NIFLA invalidated

09:28:42 that compelled speech requirement.

09:28:44 Finally, there's the biannual transparency

09:28:47 report. This is 120.053. This requires voluminous detail

09:28:50 on top of everything else that we've already talked about.

09:28:53 Social media platforms would need to publicly state

09:28:56 through compelled speech the total number of instances
09:28:59 they were alerted to policy-violating content, broken down
09:29:03 by how they were alerted. The number of instances that
09:29:05 they took action categorized by the rule violated, as in
09:29:09 they have to be reporting their internal policies and
09:29:12 broken down by how much every provision of their internal
09:29:15 policy is one of these instances where they took action.
09:29:18 The country of the user who provided the content, and this
09:29:20 is the kicker, a description of each tool, practice,
09:29:25 action, or technique used in enforcing the acceptable use
09:29:30 policy. Again, a description of each action. Every time
09:29:34 one of those 1.16 billion comments just for YouTube, just
09:29:37 for a three-month period this year, they would have to
09:29:40 provide a description of each action, tool, practice or
09:29:43 technique there. This is a sweeping law.
09:29:50 Your Honor, I will briefly turn to Section 230
09:29:52 preemption and then, the commerce clause. What I would
09:29:54 say as an initial matter about Section 230 is, I don't
09:29:58 believe that this is a case where constitutional avoidance
09:30:02 would suggest that the statutory argument needs to be
09:30:05 reached before the First Amendment argument, and there's
09:30:07 two reasons for that.
09:30:08 First of all, we have raised the exception 230
09:30:13 preemption argument for Section 7, the viewpoint-based
09:30:15 prohibition. We have not raised the Section 230

09:30:18 preemption argument for Section 2, all the operational
09:30:19 disclosure arguments. So you'd have to reach the First
09:30:21 Amendment issues regarding Section 2. And those First
09:30:24 Amendment issues are going to include: Do social media
09:30:28 platforms have protected editorial discretion? They do
09:30:31 under Hurley and Tornillo and Pacific Gas. And you're
09:30:34 going to have to also be evaluating it's the same social
09:30:39 media platform definition that's content-based that
09:30:41 trigger strict scrutiny.

09:30:42 So your Honor would have to address those
09:30:44 questions for Section 2, so there'd be nothing left to
09:30:46 then avoid in getting to the First Amendment analysis on
09:30:50 Section 7. Regardless, turning to Section 230, defendant
09:30:54 has said that we lack a cause of action to raise Section
09:30:57 230 presumption. That's not right. We, of course, can
09:30:59 raise an Ex Parte: Young federal equity cause of action to
09:31:02 enjoin state officials from violating federal law
09:31:06 prospectively. That's the Evac case from the Fifth
09:31:08 Circuit.

09:31:08 We also have a 42 U.S.C. 1983 cause of action.
09:31:12 We cite Golden State for that proposition. Your Honor
09:31:14 need not decide that issue now, but we clearly have a
09:31:17 cause of action. I mentioned Doe vs. MySpace, the Fifth
09:31:22 Circuit has said, quote, Section 230 specifically provides
09:31:24 liability for decisions relating to the monitoring,

09:31:27 screening and deletion of content from its network,
09:31:30 actions quintessentially related to a publisher's role.
09:31:37 Also, the text of 230(c)(2), protects content moderation
09:31:41 that a platform subjectively considers to be
09:31:43 objectionable. And objectionable includes, again,
09:31:45 offensive and inappropriate. These are viewpoint-based
09:31:47 concepts.
09:31:48 Defendant says, well, the ejusdem generis canon
09:31:52 should apply, but importantly, defendant does not offer an
09:31:55 alternative interpretation of what the statute should be.
09:31:58 The initial terms that it say need to be read to inform
09:32:01 what objectionable means don't offer a readily
09:32:04 identifiable genus. The terms "obscene," "lewd,"
09:32:08 "lascivious," "filthy," "excessively violent,"
09:32:09 "harassing," there's no concept other than a broad
09:32:13 definition of objectionable they could possibly obtain
09:32:19 there.
09:32:19 Also, the defendant says 230 somehow would only
09:32:24 extend to damages claims. No court has ever accepted
09:32:27 that. 230(e)(3) clearly says no cause of action, a
09:32:30 lawsuit can be brought under 230. And the CDA provides
09:32:34 immunity from suit. That's the Nemet case that we cited.
09:32:37 On the commerce clause provision, your Honor, we
09:32:41 think that this is clearly a First Amendment violation.
09:32:43 But if somehow the Court would need to get to the commerce

clause issues -- and we would recommend that the Court do address all of the arguments we've raised -- is we don't think the litigation is going to end after this phase. The defendant doesn't dispute that this would compel social media platforms to continue operating in Texas, even if they would rather leave the state and not submit to this onerous law. To be very clear, social media platforms want to be providing their beneficial services to Texans without having to be burdened by this unconstitutional law.

But the Second Circuit case we cited from -- or, sorry, the National Electrical Manufacturers case from the Second Circuit said the commerce clause prohibits states from denying companies the choice to stay or leave. And yet, that's exactly what this provision would do by prohibiting or denying access based on a user's geographic location in this state or any part of the state.

Also, House Bill 20 would require the worldwide dissemination of speech because this isn't just limited to the Texas geographical boundaries. Instead, it creates an entitlement for Texas users to receive expression from anywhere in the world that is not viewpoint-based moderation of others' viewpoints. This is a clear extraterritorial regulation. I mentioned the preliminary injunction factors. Loss of First Amendment freedoms for

09:34:03 even a moment is irreparable. State has no interest in
09:34:06 enforcing an unlawful law. And injunctions protecting the
09:34:09 First Amendment freedoms are always in the public
09:34:12 interest. This law is facially invalid, it's overbroad.
09:34:15 It is an incredible intrusion on First Amendment-protected
09:34:18 editorial discretion. It's content-based, it's speaker-
09:34:21 based, it's viewpoint-based. Strict scrutiny is triggered
09:34:24 in all sorts of ways. The law is vague. Even then, the
09:34:27 state doesn't have a sufficient interest. The two
09:34:28 interests it posited both have been rejected by the
09:34:31 Supreme Court. The law is not at all tailored. Common
09:34:34 carrier doesn't matter at all. Common carriers retain
09:34:37 First Amendment rights.
09:34:38 Your Honor, with that, unless you have any
09:34:40 further questions.
09:34:41 THE COURT: I do have one question. Are there
09:34:44 any distinctions between any of your constituent members
09:34:50 that are relevant and would require a development or
09:34:56 factfinding prior to any imposition of relief in the case?
09:35:01 MR. KELLER: No, your Honor. Our legal arguments
09:35:03 are purely legal questions. Tornillo is a facial
09:35:06 challenge case. NIFLA's a facial challenge case. There
09:35:09 are no legal arguments that we are raising that say, well,
09:35:13 since Facebook does editorial discretion in a certain way
09:35:17 and YouTube does it in a different way, that somehow that

09:35:20 there's -- there's a constitutional distinction that it
09:35:22 would be constitutional in one application and not the
09:35:25 other. Rather, across the board, whenever Section 7 says
09:35:28 you cannot do viewpoint-based content moderation on
09:35:33 covered social media platforms, that's unlawful in all
09:35:35 applications. Also, it's overbroad and the overbreadth
09:35:38 doctrine is another aspect of this that shows that there
09:35:40 would not be any factual development that's needed for a
09:35:43 particular social media platform.
09:35:45 We clearly have standing. We're the object --
09:35:48 social media platforms are the object of this regulation.
09:35:51 They want to exercise viewpoint-based content moderation
09:35:55 at times, and House Bill 20 prohibits them from doing
09:35:57 that. And they would have all sorts of costs in trying to
09:36:01 modify their systems to comply with this burdensome,
09:36:04 onerous law.
09:36:04 The irreparable injury collapses back to the
09:36:07 First Amendment analysis. So you don't even need factual
09:36:10 development there. So these are facial challenges. The
09:36:11 law is unconstitutional on all applications or, at
09:36:14 minimum, it's overbroad. There's no facts needed to
09:36:17 develop that that are specific to any platform versus a
09:36:21 different one.
09:36:21 THE COURT: I'm not persuaded that the disclosure
09:36:25 requirements of the bill violate the First Amendment.

09:36:27 Have you advanced any other theory that would support the
09:36:33 relief that you're requesting?
09:36:36 MR. KELLER: So the commerce clause arguments
09:36:38 would still apply to disclosure requirement. But, your
09:36:42 Honor, what I would also say about, you know, the
09:36:45 disclosure requirements and the operational requirements
09:36:47 is, we urge your Honor to find First Amendment violations,
09:36:52 but because of all the onerous burden of having to do
09:36:55 notice and explanation, appellate review, disclosing all
09:36:58 of this information when there is no sufficient
09:37:01 governmental interest.
09:37:03 But to take your Honor's hypothetical on its
09:37:04 terms, if you were to say that there wasn't a First
09:37:07 Amendment violation, the commerce clause arguments
09:37:09 absolutely would still apply. And again, this compels
09:37:12 social media platforms to remain operating in Texas; it
09:37:14 compels the worldwide dissemination speech; and it would
09:37:19 submit these companies to the extraterritorial regulation,
09:37:24 including Section 2's disclosure and operational
09:37:27 requirements.
09:37:27 THE COURT: Thank you very much.
09:37:28 MR. KELLER: I'll reserve the remaining balance
09:37:30 of my time for rebuttal. Thank you.
09:37:32 THE COURT: Thank you.
09:37:37 Ms. Corbello.

09:37:41 MS. CORBELLO: Good morning, your Honor.

09:37:44 THE COURT: Good morning.

09:37:46 MS. CORBELLO: Your Honor, before I start, I just want to make the Court aware that my co-counsel, Ben Lyles, will be handling the commerce clause and preemption clause portions of this argument. If it's all right with the Court, I'll be doing everything else.

09:38:06 THE COURT: Great. Thank you.

09:38:07 MS. CORBELLO: H.B. 20 is constitutional because it prohibits discrimination, discriminatory practices by common carriers, and the platforms are common carriers. As much as plaintiffs want to rely on a single line from Justice Thomas' concurring opinion in Denver Area Education and Telecommunications Consortium, that line simply has no bearing in this case. First reason why. It's taken completely out of context within the scope of that concurring opinion.

09:38:42 In that discussion that Justice Thomas is having, he makes that comment -- he is making a comparison between leased access channels and public access channels. Because what the plaintiffs have done is tried to make a point that leased access channels somehow have a lesser right to decline to carry indecent channels because they are common carriers. And so, what Justice Thomas was saying at that point was no. Just simply because we name

09:39:09 leased access channels common carriers doesn't mean that
09:39:11 they are any different from public access channels where
09:39:14 we've already said you don't have to carry indecent
09:39:17 channels that you don't want to. It's the same thing. It
09:39:19 has -- common carrier has no consequence for the First
09:39:22 Amendment when it comes to forcing that common carrier to
09:39:27 engage in speech it doesn't want to.
09:39:28 Here, the fundamental difference is, H.B. 20 does
09:39:31 not do that. H.B. 20 prohibits viewpoint discrimination.
09:39:35 It does not prohibit content moderation. That is clear
09:39:38 from the fact that it has an entire provision dictating
09:39:41 that the companies should create acceptable use policies
09:39:45 to the extent they don't already have them -- and it
09:39:47 appears they all already do -- and then, moderate their
09:39:50 content accordingly, again, as they already do.
09:39:53 It is only once the companies have decided on
09:39:56 their own what categories of content they want to moderate
09:40:00 and to prohibit that they can't then go back and
09:40:04 discriminate based on viewpoint. It's a very common law
09:40:07 under the common carrier doctrine that common carriers
09:40:11 cannot discriminate against their users.
09:40:13 And so, contrary to what plaintiffs are talking
09:40:18 about, the Denver Area single quote from Justice Thomas
09:40:21 simply has no bearing here. And strikingly, they don't
09:40:28 mention that Justice Thomas also authored the concurring

09:40:32 in Biden vs. Knight First Amendment Institute at Columbia
09:40:34 University, where he clearly recognized that the common
09:40:37 carrier doctrine has at least some bearing on First
09:40:40 Amendment rights, particularly when it comes to social
09:40:43 media platforms. He engaged in a lengthy discussion of
09:40:46 all the various ways in which a common carrier can be
09:40:49 determined: Market power, availability to the public,
09:40:53 countervailing government benefits.
09:40:56 And then, he said based on that, when someone is
09:40:59 deemed a common carrier, when a platform is deemed a
09:41:02 common carrier, it's going to be bound to serve -- quote,
09:41:04 bound to serve all customers alike without discrimination,
09:41:08 unquote. So surely Justice Thomas has recognized that
09:41:14 common carrier status does, indeed, have First Amendment
09:41:15 consequences. It doesn't in terms of forcing speech, but
09:41:18 it does in terms of prohibiting discrimination.
09:41:20 And just to go over the common carrier in much
09:41:23 more depth than plaintiffs want to, platforms are -- the
09:41:27 platforms are common carriers here in this function, their
09:41:31 function as hosts of user-generated content. That is the
09:41:33 only function that this court has to declare them common
09:41:37 carriers in. It does not have to declare them common
09:41:39 carriers in every function that they operate in. It
09:41:41 doesn't have to declare them common carriers for when they
09:41:43 post their own speech on their platforms. Only when

09:41:46 hosting user-generated content are they operating as
09:41:49 common carriers.
09:41:49 First reason why is market power. There is a
09:41:53 litany of cases that talk about market power when it comes
09:41:57 to common carriers, and Justice Thomas recognized that
09:42:00 that market power exists here for these platforms in Biden
09:42:04 vs. First Amendment Knight. It can't be seriously
09:42:07 disputed, and as the Court might notice, it hasn't been
09:42:10 seriously disputed.
09:42:10 The second factor that this court can look at --
09:42:13 and by the way, this is a fact-intensive inquiry. All the
09:42:17 cases dictate that this is something that is
09:42:20 fact-intensive. The Southern District in 2020 had the
09:42:24 common carrier issue and dictated that it was a
09:42:27 fact-intensive inquiry. This is something that requires
09:42:30 evidence from all the platforms, requires a factual
09:42:34 analysis that simply isn't present in plaintiffs'
09:42:37 preliminary injunction motion.
09:42:39 The second fact that this court should require
09:42:43 evidence on and should require actual factual assertions
09:42:47 on are benefits from the government. Plaintiffs have
09:42:51 stood up here today and said that Section 230 is not a
09:42:54 benefit that they receive from the government. They've
09:42:56 said that it has no bearing in this case. Section 230 is
09:43:00 undoubtedly a countervailing benefit that the companies

09:43:05 receive that deem them common carriers. Many common
09:43:08 carriers have similar freedom from liability for
09:43:13 third-party speech or actions that they host in their
09:43:16 functions as common carriers.
09:43:25 This court asked plaintiffs' counsel a moment ago
09:43:29 to talk about this argument of wanting it both ways.
09:43:32 Section 230 and this argument against H.B. 20 is surely
09:43:36 wanting it two ways. Under Section 230, the platforms
09:43:39 fought long and hard through their lobbying firms with
09:43:43 this point of we are not liable for this speech because we
09:43:46 aren't engaging in this speech. We aren't expressing
09:43:48 anything when we host user-generated content, and we don't
09:43:51 take ownership of anything that is being posted on our
09:43:54 platforms by our users.
09:43:55 And now, what this court inherently has to find
09:43:59 if it rules H.B. 20 unconstitutional is that the platforms
09:44:02 are engaging in this speech. They are agreeing with the
09:44:06 viewpoints that their users post on their platforms, and
09:44:11 they are taking ownership of them. And they want to
09:44:15 engage in the speech when it benefits them, and they want
09:44:18 to pretend that they aren't when it doesn't. That is
09:44:21 exactly wanting it both ways.
09:44:24 Other benefits from the government, currently all
09:44:27 they get are benefits without regulation. Aside from
09:44:30 Section 230, they successfully lobby against almost any

09:44:34 other government regulation. And they receive billions of
09:44:37 dollars from states every year in subsidies. These are
09:44:41 the types of benefits, again, looking at any case where a
09:44:46 common carrier is discussed are benefits that those common
09:44:49 carriers receive.
09:44:53 THE COURT: What's the magic of the number 50
09:44:56 million? I mean, what is the state's interest in imposing
09:45:02 these types of regulations for folks who have 50 million
09:45:06 users and not 40, or 30, or 20? I mean, if they're that
09:45:13 powerful state interests, shouldn't they equally -- I
09:45:16 mean, 20 million is not insubstantial.
09:45:18 MS. CORBELLO: I'm sorry, what was that last
09:45:20 number?
09:45:20 THE COURT: Twenty million is not insubstantial,
09:45:23 in other words, in terms of the effect. If they're trying
09:45:25 to give effect to some compelling state interest, why 50
09:45:28 million?
09:45:29 MS. CORBELLO: Your Honor, I'm not privy to all
09:45:32 of the legislative discussions on the number, however, as
09:45:35 this court can see, based on plaintiffs' members, that
09:45:38 number does encompass all of what we generally as the
09:45:42 public know to be social media platforms. It encompasses
09:45:46 particularly those social media platforms that impact our
09:45:49 society day in, day out, impact our children, impact our
09:45:52 lives.

09:45:54 THE COURT: It coincidentally identifies
09:45:58 particular companies that tend to skew a certain way that
09:46:04 legislators and state executives have expressed viewpoint
09:46:08 problems with.
09:46:10 MS. CORBELLO: Your Honor, that's not by virtue
09:46:12 of the fact that they have 50 million users. Those
09:46:17 platforms perhaps skew a certain way, however, if you look
09:46:21 at the other platforms, I think plaintiffs mentioned
09:46:25 Parler and Gab, while those platforms may skew a different
09:46:28 way and they also have less than 50 million users, the
09:46:30 reason they have less than 50 million users is because
09:46:32 these platforms have so much market power that they're
09:46:35 able to make those platforms essentially obsolete. And
09:46:38 so, they are the ones creating the market where they all
09:46:42 lean a certain way. It's not the 50 million.
09:46:44 THE COURT: They're creating the space. Their
09:46:47 users are creating the market. I mean, it seems to me,
09:46:51 what you're doing is saying the people can choose the
09:46:57 sites that they want to participate on and they've done
09:47:02 that, and the state has a problem with the ones who are
09:47:08 particularly popular, and so, they want to somehow
09:47:11 regulate them and not the ones that are -- that have not
09:47:16 achieved that kind of popular success.
09:47:18 Why shouldn't people have -- choose, without
09:47:23 state regulation, the platform on which they want to

09:47:28 communicate and receive information and have information
09:47:32 curated for them? Why shouldn't they have the ability to
09:47:35 do that without state interference?
09:47:36 MS. CORBELLO: Nothing in H.B. 20 prevents a user
09:47:39 from choosing which platform it wants to use. All H.B. 20
09:47:43 does is protect those users when they use social media
09:47:46 platforms that have 50 million or more users from
09:47:49 discriminating against them.
09:47:50 THE COURT: But don't you think that part of the
09:47:52 appeal of these platforms is that they curate in ways that
09:47:58 would be prevented by this legislation?
09:48:01 MS. CORBELLO: Nothing in H.B. 20 prevents
09:48:02 curation of content, your Honor. Again, what H.B. 20 does
09:48:06 is prevent viewpoint discrimination.
09:48:08 THE COURT: Yeah, unpack that for me.
09:48:10 MS. CORBELLO: Sure. The Supreme Court has been
09:48:13 very clear in its definitions of content and viewpoint and
09:48:16 distinguishing those two things. H.B. 20 very clearly
09:48:19 never mentions that platforms cannot discriminate based on
09:48:24 content. It permits platforms to continue to choose: We
09:48:28 would like this list of content on our platforms, and we
09:48:31 would like to prohibit this list of content on our
09:48:33 platforms. It is only then that you cannot discriminate
09:48:37 based on the viewpoint within that content. If you have a
09:48:39 category of permitted content, discrimination cannot

09:48:44 occur. It's the same as in any sort of university
09:48:49 protected by Title IX, any sort of labor act where
09:48:53 discrimination is prohibited. Once you are allowing
09:48:57 employees, members of the public, users, anyone onto your
09:49:01 platform and giving them terms and services to abide by,
09:49:04 you can't then go in and treat them differently based on
09:49:07 their viewpoint, discriminate against them.
09:49:09 It's a very common regulation by the government,
09:49:11 and it's something that is entirely permitted here.
09:49:15 THE COURT: So the smaller ones can do it, but
09:49:18 the bigger ones can't. Why make that distinction in terms
09:49:21 of the numbers of users?
09:49:24 MS. CORBELLO: It goes back to the common carrier
09:49:26 status, your Honor. Governments are entirely permitted to
09:49:30 deem certain industries common carriers. A common
09:49:35 carrier, since one of the characteristics they have to
09:49:37 have is market power and being open to a large portion of
09:49:40 the public, it simply wouldn't make sense to have small
09:49:44 companies that aren't open to a large portion of the
09:49:47 public.
09:49:48 THE COURT: Well, they're open -- just because
09:49:50 they don't happen to have that many, they're open to them.
09:49:53 MS. CORBELLO: They are, your Honor, but they
09:49:54 also don't have the market power that these platforms have
09:49:57 to make sure that those platforms never succeed, that they

09:50:00 don't appear on any of their application stores so that
09:50:03 users can't access them as carefully. And again, market
09:50:07 power, monopoly power is a very key characteristic of
09:50:12 common carriers, and it's something that clearly the
09:50:14 smaller user companies aren't going to have.
09:50:16 Moving on to the First Amendment argument unless
09:50:34 this court has any more questions about common carriage.
09:50:37 THE COURT: I don't. Thank you.
09:50:39 MS. CORBELLO: I just want to be clear, this
09:50:40 court doesn't even have to reach the First Amendment
09:50:43 analysis if it deems the platforms to be common carriers
09:50:46 and their function as host of user-generated content.
09:50:51 That holding would allow H.B. 20 to go forward, would
09:50:54 allow H.B. 20 to prohibit viewpoint discrimination. If
09:50:57 this court reaches First Amendment analysis, though,
09:51:00 plaintiffs have still not shown a likelihood of success on
09:51:02 that claim.
09:51:07 Plaintiffs spent a long time up here talking
09:51:10 about editorial discretion and the fact that they moderate
09:51:15 content, but as has been the theme throughout this lawsuit
09:51:17 so far, there's been no specific examples of how that
09:51:21 occurs. This court even specifically asked, can you
09:51:23 detail for me what that editorial discretion looks like?
09:51:26 But again, all plaintiffs can do is just say, we moderate
09:51:30 content and it expresses a viewpoint. We don't know what

content that is. We don't know how these algorithms engage in both moderation of content and their admitted moderation of content to achieve user engagement and to achieve ad revenue.

There has been no distinguishing between what those practices are. There's been -- we asked for many hours at depositions how the human interaction with content and the AI interaction with content works. And plaintiffs in their platforms either didn't know the answer and someone else did, which we were not allowed to depose, or they could only give, again, broad assertions of we moderate content and it expresses our view. We want our platforms to look a certain way, say a certain thing. We don't know what that is.

THE COURT: Well, but that's -- I mean, to dispute that is to dispute one of the fundamental purposes of this -- stated purpose of this legislation and that is, they've been successful in positioning themselves in ways that people who are legislators and state executives have not liked because they skew a certain way. So the fact that -- I mean, the proof is in the pudding. They are what they are and that's why people have a problem with them, right?

So to say, oh, it's not a real thing that you're not really exercising this editorial but then, to hold

them accountable for the editorial position that they've achieved, right? I mean, they have -- the reason that these platforms have become offensive to some is that they have achieved a certain place on the political spectrum perhaps or social spectrum, and then, to say yeah, but that's not a real thing, well, it is a real thing. That's precisely why you have a problem with them, right?

MS. CORBELLO: I apologize if I've misstated, your Honor. We're not arguing that it's not a real thing and not ever. What we're arguing is at this stage, at the PI stage where plaintiffs have to show likelihood of success by presenting facts and evidence, there are none. Simply claiming we have editorial discretion has never -- in all of the cases plaintiff cite has never been enough for the Court. That's never where it ends.

The plaintiff is required to explain how that editorial discretion occurs. And like your Honor asked, what is the aim of editorial discretion? Because if it is -- if the primary aim is to achieve more revenue, more user engagement, then yes that is a different kind of speech: that's commercial speech. It's not we're expressing a viewpoint, we like safety, we like this certain sort of speech. Those things matter. It's not that they don't matter. It's that we don't know what that is at this point.

09:54:16 And for the extraordinary remedy of a preliminary
09:54:19 injunction for a law that hasn't even gone into effect
09:54:23 yet. Plaintiff should be required to show more than
09:54:25 simply standing up here and saying editorial discretion
09:54:27 numerous times.
09:54:42 The viewpoint discrimination and the content
09:54:44 discrimination is also relevant to the First Amendment
09:54:46 analysis but not in the way that plaintiffs have spoken to
09:54:49 this court about. Plaintiffs take a lot of issue with the
09:54:54 fact that they don't know every single distinction between
09:54:57 content and viewpoint, and there are fuzzy lines that
09:55:00 would exist with H.B. 20.
09:55:01 The Supreme Court in Reed vs. Town of Gilbert,
09:55:05 576 U.S. 155, has been clear that there is a distinction
09:55:08 between those two terms. And simply because fuzzy lines
09:55:11 exist at some part of that distinction does not invalidate
09:55:15 an entire law.
09:55:16 What this court should do is require those fuzzy
09:55:22 lines to be supported by facts and evidence, and again,
09:55:24 there are none. Plaintiffs want to claim that they won't
09:55:27 be able to moderate, for example, Nazi speech. Where in
09:55:32 Section -- where in H.B. 20 does it require that? H.B. 20
09:55:34 says you can get rid of any content you want. You can
09:55:37 prohibit any content you want. You can't prohibit content
09:55:41 based on viewpoint discrimination.

09:55:52 THE COURT: So tell me how they would come up
09:55:57 with their rules on content that would capture -- in the
09:56:08 context of pro or anti-Nazi, how would they articulate
09:56:18 their rules that would -- give me an example of how they
09:56:22 would come up with a rule addressing that.
09:56:26 MS. CORBELLO: Well, I think the platforms --
09:56:27 THE COURT: Distinguishing between content and
09:56:30 viewpoint.
09:56:30 MS. CORBELLO: Yes, your Honor. The first point
09:56:32 is, I think the platforms can be expected by this court to
09:56:36 follow Supreme Court precedent in being able to
09:56:38 distinguish between content and viewpoint in that sort of
09:56:41 category. We briefed somewhat as an example, the racism.
09:56:46 Racism is a content category. It was agreed to by
09:56:51 plaintiffs and the platforms in their depositions that
09:56:53 that would be a content category. Racism would include
09:56:57 Nazi speech. It would include other forms of racist
09:57:00 speech.
09:57:01 So it would only be then that, for example,
09:57:04 plaintiffs can't discriminate against users who post Nazi
09:57:09 speech and don't post -- and don't discriminate against
09:57:12 users who post speech about that's antiwhite or something
09:57:17 like that. And so, that would be one way to distinguish
09:57:21 it. But again, to the extent plaintiffs stand back up
09:57:24 here and say, well, no. It's still a fuzzy line to us,

09:57:27 those fuzzy lines don't invalidate H.B. 20, and those
09:57:30 fuzzy lines don't make it likely to succeed on the merits
09:57:35 of their claims. What plaintiffs have to do is present
09:57:37 evidence of why those fuzzy lines are so complicated. We
09:57:41 don't know what those algorithms actually look for. We
09:57:44 know what they say to this court that they look for. They
09:57:46 say, well, we moderate for Nazi speech. What does that
09:57:49 mean?
09:57:49 I barely know what an algorithm does. But in my
09:57:53 basic knowledge of what it does, it's very complex and
09:57:56 it's not so simple as pressing a button that says go find
09:57:59 all the Nazi speech. It moderates for a lot of different
09:58:04 things. It screens for a lot of different things other
09:58:07 than just one piece, one type of content. And for this
09:58:09 court to not know what it's screening for, what the
09:58:11 categories are, how is it being trained, how is it
09:58:15 learning to be trained, what's being added to the data
09:58:18 sets in order for it to be trained, there's nowhere to
09:58:22 start with the fuzzy lines until we get that information.
09:58:26 And I think that speaks, again, to the fact that
09:58:33 the primary -- the primary function of these algorithms,
09:58:38 again, is user engagement. Both Mr. Potts and Ms. Veitch
09:58:43 explain that that is where the majority of their revenue
09:58:44 comes from. Eighty to 100 percent of the revenue from
09:58:48 Facebook comes from advertisement, which advertisement

09:58:50 revenue increases because of user engagement.

09:58:53 This court actually doesn't need to look much
09:58:56 further to see that these are engagement algorithms and
09:58:59 not content moderation algorithms than plaintiffs' own PI
09:59:04 motion, which explains that how they moderate content now
09:59:07 is to create this safe environment that users like and
09:59:12 advertisers want to stay a part of. And they say that
09:59:15 H.B. 20 is going to cause those users and those
09:59:17 advertisers to leave.

09:59:18 Well, the only reason that that's the main
09:59:22 concern, then, is because the users and advertisers are
09:59:24 what create their revenue or what create their
09:59:26 profitability. Their concern is profit. Their primary
09:59:30 and majority concern is profit, and that's what makes
09:59:34 these algorithms commercial speech under either definition
09:59:37 that plaintiffs have posited. Plaintiff said expression
09:59:39 related solely to the economic interests of the speaker
09:59:41 and its audience. All of their content moderation
09:59:43 algorithms are motivated by that. They've said so
09:59:45 themselves. They're motivated to keep their users on the
09:59:48 platforms. In order to keep those users on the platforms,
09:59:51 they moderate content in a certain way, and when they
09:59:53 stay, the advertisers engage more and they get more
09:59:56 revenue.

09:59:56 THE COURT: And what if there's a close

09:59:58 correlation between the viewpoints of their users and the
10:00:02 users' willingness to use the site and then, the value of
10:00:08 those user hits to an advertiser? I mean, it's -- that's
10:00:13 viewpoint driven, right?
10:00:16 MS. CORBELLO: I'm sorry, your Honor, I'm a
10:00:17 little confused on your question.
10:00:18 THE COURT: Yeah. I just mean it is commercial
10:00:21 but it's -- to the extent that an advertiser wants to
10:00:26 advertise on a certain platform, it might be because that
10:00:30 attracts a certain kind of user and a certain kind of user
10:00:33 who has certain views about certain things. And that's
10:00:36 why they're motivated to post -- to have algorithm that
10:00:44 drives certain viewpoints, right?
10:00:46 MS. CORBELLO: Well, your Honor, two things.
10:00:48 First, we don't have any evidence of that. Again, we
10:00:51 asked those questions in deposition. We asked about the
10:00:55 basis for their knowledge of whether advertisers want to
10:00:57 stay, when they want to leave, how do you know that, and
10:01:00 we weren't able to get any answers on that. And
10:01:02 plaintiffs themselves didn't know enough about the
10:01:05 platforms to give us those answers.
10:01:08 Secondly, again, while -- this is a common theme
10:01:12 here, while the platforms claim that their advertisers
10:01:16 want certain types of viewpoints show -- you know,
10:01:18 viewpoints that create safety and peace and love, there's

10:01:21 plenty of evidence on the outside world that dictates that
10:01:24 that's not really what's happening. And as we've seen,
10:01:26 advertisers aren't exactly leaving these platforms in
10:01:30 droves at the moment. There was a recent story out of NBC
10:01:33 news about an AI that was created to become a user on
10:01:39 Facebook and started expressing right-leaning sorts of
10:01:42 views, and Facebook's content moderation algorithms
10:01:45 actually matched that person with more extremist
10:01:48 right-wing views to the point that they're clearly meant
10:01:52 to only incite and do nothing more. These advertisers
10:01:55 know that that's what's going on. Users come onto these
10:01:58 platforms with all sorts of viewpoints and they don't
10:02:01 leave. The advertisers don't leave because of it.
10:02:03 So to the extent we have evidence, it's contrary
10:02:06 to that position, but again, we really don't have any at
10:02:10 this point other than what whistleblowers or the media
10:02:13 says and what the platforms want to say on their
10:02:15 self-serving websites.
10:02:19 To the extent any of these algorithms rotely
10:02:24 apply their speech, they're not chilled by H.B. 20.
10:02:28 Again, H.B. 20 is about preventing discriminatory
10:02:31 practices. Platforms state publicly that they don't
10:02:34 discriminate based on viewpoint. So it's hard to see how
10:02:37 H.B. 20 would chill speech that they claim that they're
10:02:39 not engaging in.

10:02:42 Their motion evidence asserts only that they're having to moderate content in a different way, and that's how it will chill their speech; but again, H.B. 20 doesn't require them to do that. H.B. 20 says continue to have your policies, continue to prohibit the content you want to and just don't discriminate against people. To be clear, this law is content neutral. The law doesn't purport to regulate any sort of specific type of speaker, of viewpoint, of content. It very broadly states content, viewpoint, user.

The Supreme Court -- or the Fifth Circuit said -- I apologize. This court said as affirmed by the Fifth Circuit in Defense Distributed, 121 Federal Supplement 3d, 680.

THE COURT: Anytime you say this court, it was affirmed by the Fifth Circuit, I'm thinking which one was that.

MS. CORBELLO: I'll give you a copy, your Honor.

THE COURT: There's a 23-page dissent, though.

MS. CORBELLO: That's true. We won't talk about that.

The discrimination of whether regulation of speech was content-based, quote, requires the Court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys.

10:03:59 There's no distinction here. The only prohibition is
10:04:03 viewpoint discrimination. Doesn't matter what that
10:04:06 viewpoint is. It doesn't matter who's saying it. The
10:04:09 platforms cannot discriminate against their users.
10:04:11 Plaintiffs' counsel made the argument that this
10:04:19 is a viewpoint-based law because it attempts to regulate
10:04:26 speech that is offensive. Again, they still don't
10:04:29 identify what that speech is, so it would be difficult for
10:04:31 this court to find that there is a speech that is being
10:04:33 targeted here when we don't know what it is.
10:04:36 Again, all H.B. 20 does is state you're
10:04:41 prohibited from viewpoint discrimination. Plaintiffs'
10:04:44 argument is that because viewpoint discrimination includes
10:04:47 certain viewpoints, then it is a viewpoint-based,
10:04:51 non-content-neutral law. That's simply not so. Any sort
10:04:57 of viewpoint discrimination regulation would necessarily
10:05:00 require a -- any viewpoint underneath that to be
10:05:04 prohibited from discrimination. It certainly doesn't make
10:05:08 the law itself a viewpoint-based restriction on the
10:05:13 platforms. And so, intermediate scrutiny applies and H.B.
10:05:17 20 passes.
10:05:18 Plaintiffs have made the curious argument that
10:05:21 the law hasn't been properly tailored because the
10:05:24 government could simply just make its own platform.
10:05:28 Again, I have probably the most limited knowledge of

10:05:32 anyone in this room of how that would occur, but it
10:05:34 doesn't seem like a proper tailoring that should have to
10:05:38 occur in order for H.B. 20 to survive. Certainly
10:05:41 plaintiffs have cited no case where a court has said,
10:05:44 well, government, you should just go into this field or
10:05:47 this function in order for this law to be properly
10:05:52 tailored. And certainly there wouldn't be one. That's
10:05:56 not something that's required under intermediate scrutiny.
10:05:59 H.B. 20 has been significantly tailored because, again, it
10:06:01 tailors those social media platforms that have the market
10:06:03 power, have the openness to the public, have the
10:06:06 countervailing government benefits that require them to be
10:06:11 common carriers and require them to operate in a way
10:06:14 that's nondiscriminatory.
10:06:15 THE COURT: They also, because of the volume they
10:06:17 have, have the vulnerability of having to deal with all of
10:06:26 these regulation of reporting, appeals, processes on a
10:06:30 level and in a magnitude that other people don't. And if
10:06:34 I were to believe them, it makes it virtually impossible
10:06:37 for them to operate if they have to deal with all of the
10:06:43 instances where their decisions are being complained of,
10:06:49 appealed. And they operate on a scale that that, in
10:06:54 itself, is going to make it impossible for them really to
10:06:58 operate.
10:07:00 MS. CORBELLO: Just to be clear, your Honor,

10:07:01 speaking specifically about the disclosure requirements?

10:07:03 THE COURT: Yes. And everything that they have

10:07:06 to do to document the actions they take in response to --

10:07:10 so yeah.

10:07:12 MS. CORBELLO: I understand, your Honor, that the

10:07:13 platforms' position is that this would be impossible. The

10:07:16 disclosure requirements would be impossible to meet, but

10:07:18 again, there's no evidence of that. Again, we asked both

10:07:23 plaintiffs and both platforms at their depositions what in

10:07:27 H.B. 20 would be burdensome in terms of the disclosure

10:07:30 requirements, and we didn't get an answer.

10:07:32 And I'll go, again, one-by-one as counsel did.

10:07:35 The notice and complaint and appeal portions, the

10:07:37 disclosures each time you remove content, plaintiffs'

10:07:40 counsel stood up here and said that's burdensome. Didn't

10:07:43 provide a reason why. Didn't say, you know, what evidence

10:07:47 they have that the companies can't comply with this. And,

10:07:50 indeed, what Facebook and YouTube told us is that they

10:07:53 already have a content removal policy where they notify

10:07:57 users when they remove content, and they give them the

10:07:59 opportunity to appeal.

10:08:01 Facebook also tells their users why they've

10:08:04 removed the content. So these are things they're already

10:08:06 doing. And what Facebook told us, Mr. Potts, his

10:08:10 deposition at deposition 99, 23 to 25, is, it takes 24

10:08:15 hours for Facebook to do this notice, notice of content
10:08:18 removal, and give them the opportunity to appeal. So at
10:08:21 least for Facebook, it doesn't appear that there's any
10:08:23 sort of burden for at least this first disclosure
10:08:26 requirement.
10:08:27 And for plaintiffs to have as-applied relief in
10:08:31 this case, they'd have to show that this requirement as
10:08:34 applied to Facebook is burdensome, and Mr. Potts has said
10:08:38 it's not. When it comes to the appeal process, again,
10:08:41 Facebook already offers that. YouTube already offers
10:08:44 that. Facebook, again, said Mr. Potts said they do it in
10:08:47 24 hours usually. Potts at page 111, 6 through 19, again,
10:08:54 there's a difference between the platforms.
10:08:55 We don't know how long it takes, for example,
10:08:58 Pinterest to do a notice and appeal requirement. And for
10:09:01 this law to be -- for this court to hold that this law is
10:09:04 burdensome on Pinterest based on these sections, we have
10:09:08 to know those things. And we need evidence from the
10:09:11 platforms.
10:09:14 Business practices, plaintiffs complained about
10:09:16 the disclosure of business practices. And again, just
10:09:19 broadly stated, it's intrusive and it informs bad actors.
10:09:23 Again, how? As to the bad actors, we asked those
10:09:27 questions in depositions. We couldn't quite get an idea
10:09:30 of what information specifically they're scared that bad

10:09:33 actors are going to get a hold of.

10:09:35 And in terms of intrusion, as this court may
10:09:38 notice, the platforms have copious amounts of transparency
10:09:45 reports on their website. They also submit reporting to
10:09:47 their investors. And between those two, again, we asked
10:09:51 at deposition, what is the difference in what H.B. 20
10:09:54 requires you to do and what you're already doing with your
10:09:57 transparency reports and what you're already doing for the
10:09:59 Feds? And again, we couldn't get a single answer as to
10:10:03 what portion of that business practices requirement is so
10:10:07 burdensome that they don't already engage in it.

10:10:10 THE COURT: One of the things they're saying is
10:10:11 that the statute would require them potentially to
10:10:16 disclose the details of the algorithms that they use,
10:10:20 which I think would suggest -- I mean, common sense would
10:10:25 suggest that that being a big part of the commercial
10:10:29 success of these operations would be if not a trade
10:10:34 secret, something that looks a lot like it. What's your
10:10:36 position with regard to that allegation?

10:10:38 MS. CORBELLO: Your Honor, if you look at the
10:10:39 text of H.B. 20, in no way does it require disclosure of
10:10:43 algorithms. In fact, the word "algorithms" is preceded by
10:10:47 the word "or" because it's a list of ways in which the
10:10:50 company could provide a certain type of information as to
10:10:53 how it's moderating content. One of which could be

10:10:56 algorithms if they deem some of those algorithms to not be
10:11:00 trade secrets. But in no way -- and I'll point out to the
10:11:02 Court that plaintiffs never quoted from H.B. 20 anywhere
10:11:05 where it says these algorithms are required by law to be
10:11:09 disclosed. They're absolutely not. It's one way in which
10:11:13 the platforms could choose to comply, but they don't have
10:11:16 to.

10:11:21 In terms of the transparency reports, too, I'd
10:11:23 urge this court to review them because they do provide a
10:11:28 lot of the information, not only that H.B. 20 requires but
10:11:31 beyond that. Plaintiffs have used it to their advantage
10:11:33 when necessary in order to explain to the Court how much
10:11:38 pieces of certain content have been removed, how quickly
10:11:41 it gets removed, AI removal versus human removal. And so,
10:11:45 clearly, this data is actually at the fingertips of the
10:11:49 platforms and is in some way retrievable.

10:11:51 We asked both platforms, well, could you create
10:11:55 an algorithm to deal with any sort of the burdens that you
10:11:57 might have in disclosing the business practices or pieces
10:12:00 of content moderated for, things like that. They didn't
10:12:04 know. So at this point, we don't have those facts that
10:12:07 support any sort of burden claim based on either one of
10:12:10 the disclosure requirements, the notice and appeal, or the
10:12:14 business practices.

10:12:15 THE COURT: So that I'm clear just -- you may

10:12:18 have addressed this already sufficiently, but to what
10:12:21 extent does a finding that these entities are common
10:12:29 carriers, to what extent is that important from your
10:12:33 perspective in the bill's ability to survive a First
10:12:40 Amendment challenge?
10:12:41 MS. CORBELLO: Your Honor, the common carriage
10:12:44 doctrine is essential to the First Amendment challenge.
10:12:47 It's why it's the threshold issue that we've briefed to
10:12:49 the Court, and why we've continued to brief it to the
10:12:52 Court, and why we have an expert on it. It dictates the
10:12:55 rest of this suit in terms of the First Amendment inquiry.
10:12:59 Again, while common carriers can't be forced
10:13:02 under the First Amendment to host certain types of speech
10:13:05 or cable channels, or anything like that, certainly under
10:13:09 the common carrier doctrine, governments can come in and
10:13:12 say you're not allowed to discriminate against people.
10:13:14 That's what H.B. 20 is doing, which is why if this court
10:13:17 finds that the legislature was within its right to declare
10:13:20 the platforms common carriers as it has done for centuries
10:13:24 and that they are common carriers by virtue of the fact
10:13:27 that they share every characteristic with every common
10:13:30 carrier that has come before them, then this court doesn't
10:13:32 need to reach the First Amendment inquiry. Certainly not
10:13:36 to the extent that we've discussed it today. But again,
10:13:38 it doesn't need to reach it because they aren't allowed to

10:13:41 discriminate against people, and H.B. 20 is -- prohibits
10:13:43 that discrimination and nothing more.
10:13:52 As we've noted in our briefing, plaintiffs have
10:13:55 turned their requested relief from an as-applied to a
10:14:00 facial challenge. I'll point out for the Court that
10:14:03 plaintiffs' counsel at no time explained why all aspects
10:14:06 of Sections 2 and 7 are facially unconstitutional in all
10:14:12 of their applications. And certainly when there's not
10:14:14 even evidence as to how it's invalid as to each one of the
10:14:18 platforms, it's hard to see how there could be a finding
10:14:20 that it's invalid in all of its applications to all
10:14:23 platforms that are covered.
10:14:26 In terms of as-applied relief, the case law is
10:14:28 very clear. Plaintiffs are required to show for
10:14:31 as-applied relief how each one of the platforms is
10:14:34 burdened. How each one of the platforms engages in
10:14:37 speech. Why each one of the platforms shouldn't be
10:14:39 considered common carriers. Why each one of the platforms
10:14:42 are engaging in speech and how that speech looks and how
10:14:48 the disclosure requirements would burden them. Again, we
10:14:52 have no evidence of that, despite declarations and
10:14:55 depositions and interrogatories. At no time has
10:14:58 plaintiffs provided us the as-applied relief that would be
10:15:01 necessary for each one of the platforms under each section
10:15:04 that they -- and provision that they challenge.

10:15:12 This law, H.B. 20 is not overbroad. What
10:15:15 plaintiff must do in order to show likelihood of success
10:15:18 on that claim is show that either every application of the
10:15:21 statute creates an impermissible risk of the suppression
10:15:23 of ideas or that the statute is substantially overbroad,
10:15:27 meaning there's a realistic danger that the statute itself
10:15:30 will significantly compromise First Amendment protections
10:15:32 of third parties.
10:15:33 There's no impermissible risk of the suppression
10:15:37 of ideas here. Again, H.B. 20 allows platforms to
10:15:40 continue to choose the content they want to host and only
10:15:44 refrain from discriminating against viewpoints once they
10:15:47 choose that content to host. It certainly doesn't
10:15:50 compromise First Amendment protection of third parties.
10:15:53 If anything, it provides a plethora of more ideas than
10:15:59 currently exist under any sort of viewpoint discrimination
10:16:02 practices the platforms are already engaging in. And it
10:16:05 protects their rights. It protects users' rights to
10:16:08 engage in speech on their platforms.
10:16:11 As we've done in our brief, I'll incorporate the
10:16:14 arguments made in the motion to dismiss. Plaintiffs are
10:16:17 unlikely to succeed on the merits because they don't have
10:16:20 associational standing in this case. I think I've
10:16:23 mentioned many times, the lack of evidence that we have in
10:16:26 this case and where that evidence needs to come from. We

10:16:29 anticipate an extensive amount of discovery from the
10:16:32 platforms on every one of the causes of action and claims
10:16:36 and burdens that plaintiffs have made in this case, and it
10:16:39 will require much more than plaintiffs themselves for
10:16:42 these platforms to participate.
10:16:44 Plaintiffs' counsel didn't mention the
10:16:53 severability portion of our argument, but I'll just point
10:16:55 out that H.B. 20 does have a severability clause. The
10:16:58 Supreme Court noted in Ayotte at 546 U.S. 320 that courts
10:17:03 must only enjoin the unconstitutional applications of a
10:17:06 statute while leaving the other applications in force.
10:17:09 And so, should this court find that any specific
10:17:11 provisions are unconstitutional as applied to any
10:17:13 particular platforms, we'd ask that the severability
10:17:18 clause be honored as it's required to be by the Supreme
10:17:21 Court. And that any injunction be limited to the actual
10:17:24 scope of harm that the platforms have shown. Again, it's
10:17:27 defense's position that there isn't any harm shown at this
10:17:30 point. All there is is broad, vague allegations that harm
10:17:34 might occur based on engaging in some sort of unknown,
10:17:39 unidentified speech.
10:17:48 As to the other prongs of preliminary injunction
10:17:51 analysis, even if this court finds that plaintiffs are
10:17:55 likely to succeed on any of the merits of any of their
10:17:57 claims, which, again, Mr. Lyles will come up and talk

10:18:00 about preemption and commerce clause in a moment, there's
10:18:03 overwhelming equitable and practical concerns that
10:18:06 outweigh any sort of relief at this stage of the
10:18:08 litigation.
10:18:09 Again, there's no evidence of injury here.
10:18:12 Plaintiffs have not only shown -- failed to show
10:18:15 irreparable harm, they've failed to show any harm. And
10:18:19 where an as-applied challenge has been made, that's
10:18:21 something that has to be shown in order for this court to
10:18:24 grant relief. They will still have content moderation
10:18:27 policies when H.B. 20 goes into effect. They will still
10:18:30 be able to determine what those policies say and how they
10:18:33 operate and how their algorithms engage in the policies
10:18:36 that they set.
10:18:38 Again, the only thing they have to refrain from
10:18:43 doing is discriminating against users once they've decided
10:18:46 to host particular content. They have to provide
10:18:50 disclosures, in no particular fashion, in a way that at
10:18:53 least the platforms we were able to depose said they were
10:18:57 able to do already or they don't know how it would be
10:18:59 difficult to do for some of the provisions.
10:19:01 And any evidence of harm is undermined by the
10:19:08 fact that the recently filed amicus brief of some of
10:19:12 plaintiffs' other members have stated that H.B. 20 is not
10:19:14 harmful to them, that it's something that they can comply

10:19:17 with, and that is the law that doesn't provide any sort of
10:19:20 burden on them. Alternatively, or comparatively, the
10:19:25 state is undoubtedly harmed if this court were to enjoin a
10:19:28 state statute.
10:19:29 The Fifth Circuit said in Veasey v. Perry at 769
10:19:33 F. 3d 890, when a statute is enjoined, the state
10:19:36 necessarily suffers the irreparable harm of denying the
10:19:39 public interest in the enforcement of its laws. And so,
10:19:42 that harm has undoubtedly been shown here.
10:19:45 And again, not to mention the harm to the public,
10:19:47 which has been, I believe, the theme from the defense and
10:19:52 for good reason, the public is the reason that H.B. 20
10:19:57 exists, why H.B. 20 was passed. There's harm to the
10:20:01 public currently happening because these platforms go
10:20:05 completely unregulated. They are allowed to insulate
10:20:08 themselves from any sort of liability from anyone and
10:20:12 continue to operate behind the curtains, without any sort
10:20:16 of ability to figure out what's going on.
10:20:20 They impact our lives at the most granular level.
10:20:24 At times, they do detriment to our society, and they do so
10:20:30 while still asking this court to continue to allow them to
10:20:33 do so; to continue to let their lobbying firms stand in
10:20:37 their place that they don't have to be subject to any sort
10:20:40 of litigation or litigation obligations, and allow them to
10:20:43 continue going unregulated, continue to engage in whatever

10:20:47 discriminatory practices they want to because they engage
10:20:50 in some form of editorial speech.
10:20:52 H.B. 20 prevents this sort of practice from
10:20:56 continuing on, and we'd ask this court to deny the motion
10:20:59 for preliminary injunction.
10:21:00 THE COURT: I do have one question, if you don't
10:21:02 mind.
10:21:02 MS. CORBELLO: Sure.
10:21:03 THE COURT: Are there relevant distinctions
10:21:04 between a Texas statute and the Florida statute that would
10:21:08 in your mind explain the injunction in that case, or did
10:21:10 the Court just get that wrong?
10:21:12 MS. CORBELLO: Yes, your Honor. There are
10:21:14 distinctions between the Florida law and the Texas law
10:21:16 here. The Court will notice if it reads that statute that
10:21:21 that statute actually does regulate content. It doesn't
10:21:24 mention viewpoint. It states -- it prohibits social media
10:21:29 platforms from using post-prioritization or shadow-banning
10:21:32 algorithms for content posted by or about a user.
10:21:35 So again, there's the distinction between content
10:21:38 and viewpoint. There's also very clear -- they're clearly
10:21:45 -- I'm sorry, I didn't even read the whole quote: Content
10:21:47 posted by or about a user who's known by a platform to be
10:21:50 a candidate for office. So this is not only content-
10:21:52 based, but it's also based on candidates for office,

10:21:55 which, of course, H.B. 20 doesn't regulate content and
10:21:58 certainly doesn't regulate anything about candidates for
10:22:01 office. It also, again, regulates -- prohibits the
10:22:04 censorship, de-platforming, or shadow-banning of a
10:22:07 journalistic enterprise which the law defines based on the
10:22:11 content of its publication or broadcast. Again, these are
10:22:14 all content-based -- not content-based, but the Florida
10:22:18 law is focused on content as opposed to H.B. 20, which is
10:22:21 focused on viewpoint.
10:22:22 Mr. Lyles might get into this in more detail, but
10:22:27 the statute also permits monetary damages where H.B. 20
10:22:30 does not. And as the Court knows, one of the preemption
10:22:32 arguments is that H.B. 20 is an equitable relief statute,
10:22:36 and so, it does not actually contradict Section 230 or run
10:22:40 up against it in any way. While the Florida statute does,
10:22:43 in fact, allow significant fines for violation of that
10:22:47 law.
10:22:47 THE COURT: Thank you very much.
10:22:59 MS. CORBELLO: Yes, your Honor.
10:23:05 MR. LYLES: Good morning, your Honor. Benjamin
10:23:07 Lyles for the defendant.
10:23:09 As Ms. Corbello pointed out, I'll be addressing
10:23:11 the commerce clause and the 230 preemption issue. I think
10:23:14 I'm running out of time, so I'll make this fast.
10:23:17 THE COURT: Take your time.

10:23:18 MR. LYLES: With respect to the allegation by the
10:23:23 plaintiffs that it's -- H.B. 20 is unconstitutional under
10:23:28 the commerce clause, I'd just like to begin by noting that
10:23:32 plaintiffs venture no argument as to how H.B. 20
10:23:36 discriminates against out-of-state commerce. That is
10:23:39 what's required for the facially invalid claim. And what
10:23:43 they would have to do is bring up an in-state interest and
10:23:49 an out-of-state interest, similarly situated ones, and
10:23:53 show that the in-state interest is discriminated in favor
10:23:56 of, at the expense of the out-of-state interests.
10:23:59 Plaintiffs don't do that. They hang their whole hat on
10:24:02 the argument that H.B. 20 is excessively burdensome on
10:24:08 interstate commerce, and that's not the case.
10:24:10 So the two arguments that you just heard from
10:24:14 counsel for plaintiffs with respect to that are that H.B.
10:24:18 20 would force them to either comply with an
10:24:24 extraordinarily burdensome law or leave Texas, and they
10:24:27 can't leave Texas and they can't comply with the law. The
10:24:32 second argument was that H.B. 20 will require worldwide
10:24:37 dissemination of speech, and that was an impermissible
10:24:43 extraterritorial regulation. Neither of these are the
10:24:45 case.
10:24:45 With respect to the first, the Supreme Court in
10:24:48 Exxon made it clear that the transnational structure of a
10:24:54 market does not shield a participant in that market from

10:24:58 state regulation. So the fact that H.B. 20 would subject
10:25:03 these transnational companies to regulation within Texas
10:25:08 is in no way dispositive. What it becomes is a matter of
10:25:12 degree whether that's excessively burdensome enough to
10:25:16 make them have to leave the state.
10:25:20 And as Ms. Corbello pointed out, that's really
10:25:23 something that we need more discovery on and, also, that
10:25:28 plaintiffs have provided in their depositions evidence of
10:25:32 they're perfectly capable of complying with. To a certain
10:25:37 extent, they are already engaging in the -- in various
10:25:40 modes of disclosure transparency reporting. The sorts of
10:25:45 things that they say are so onerous that H.B. 20's
10:25:51 imposition on them would force them to leave the state.
10:25:54 I'd just like to address a bit of the authority
10:25:57 plaintiffs cite in their reply for their proposition.
10:26:01 It's a case called Lewis vs. BT Investments for this idea
10:26:06 that it violates the commerce clause when the burden is
10:26:12 too great. And that was a completely different burden
10:26:14 that this Florida law placed on these out-of-state banks.
10:26:17 Basically what it said was, if you're an out-of-state
10:26:20 bank, you just can't do business in Florida, meaning the
10:26:23 burden would be -- become a Florida bank in order to do
10:26:27 business here. Whether what -- whereas what House Bill 20
10:26:30 seeks to do is simply regulate these companies in a way
10:26:35 that they're perfectly capable of complying with, or if

they're not, that needs to be shown in discovery.

And just to your Honor's point earlier where you mentioned -- you asked Ms. Corbello if the scale of these companies, right, makes it impossible for them to deal with these requirements because they're getting so many complaints, I would also venture that the very scale is what makes them the most powerful and massively resourced companies in the world, which gives them tools that nobody else has for dealing with these things. It's sort of like the Roman Empire complaining about having to police the Roman Empire with all the resources it stripped from the Roman Empire.

With respect to the argument that H.B. 20 would disseminate speech worldwide and that is an impermissible extraterritorial regulation on speech, the Supreme Court has made clear that in Walsh that just because a state regulation has extraterritorial effects, that doesn't mean it violates the dormant commerce clause. It's a matter what is being regulated. And plaintiffs have cited no authority for the fact that what's being extraterritorially regulated here means H.B. 20 impermissibly does so.

And the Fifth Circuit in Allstate has made clear that what the dormant commerce clause does is, it protects the structure of interstate markets, not the methods of

10:28:15 operation in that market. So plaintiffs aren't
10:28:18 complaining that H.B. 20 somehow interferes with the
10:28:23 interstate internet market for social media platforms.
10:28:29 They're basically arguing it is going to force them to
10:28:32 change their method of operation which doesn't violate the
10:28:36 dormant commerce clause.
10:28:37 The Fifth Circuit has also made clear in Allstate
10:28:40 that simply by, you know, involving the internet, this
10:28:45 doesn't mean that you are -- you're insulated from all
10:28:50 regulation by the dormant commerce clause. I think that a
10:28:53 case out of the Western District, which was affirmed by
10:28:56 the Fifth Circuit, put it very nicely and that was that,
10:29:00 you know, you get -- if anybody could insulate themselves
10:29:05 from a state regulation simply by tieing their
10:29:08 transactions to the internet, that this would be
10:29:12 ridiculous.
10:29:19 I'm going to run briefly through a few --
10:29:23 actually not. I'm going to move on to the 230 in the
10:29:29 interest of time. So plaintiffs argue that 230 preempts
10:27:22 H.B. 20 in two ways. First, that Section 230 says you
10:29:45 can't get damages and -- well, let me back up for a
10:29:51 second. Section 230 doesn't preempt H.B. 20 because H.B.
10:29:58 20 does not provide for a damages remedy. It only
10:30:02 provides for an injunctive remedy.
10:30:05 Section 230 insulates platforms against only

10:30:14 liability, that is, liability for damages. And the only
10:30:19 sort of pushback you just heard from plaintiffs on that is
10:30:23 a quote from a case that they claim defines immunity as
10:30:30 immunity from suit and immunity from liability. But I ask
10:30:35 your Honor to take note that nowhere does Section 230 use
10:30:39 the word "immunity." So it uses the terms "no liability
10:30:46 shall attach." So defining immunity to include immunity
10:30:52 from non-damages causes of action is a little bit
10:30:57 disingenuous and doesn't link up with 230 at all.
10:31:04 Plaintiffs' other argument is that 230 preempts
10:31:10 H.B. 20 because 230(c)(1), the part of the statute that
10:31:15 deals explicitly with not treating interactive community
10:31:25 services as -- or internet services as publishers of
10:31:27 information has been found by the Fifth Circuit to
10:31:31 prescribe suits over moderating content.
10:31:34 Now, I'd point out that if -- that's not the
10:31:38 relevant part of the statute to argue is preempting H.B.
10:31:42 20. If H.B. 20 were preempted by that, it would have to
10:31:47 talk about how, yes, these platforms are publishers,
10:31:53 right? And H.B. 20 doesn't do that. It seeks to create a
10:31:58 cause of action for a much narrow set of acts than what a
10:32:05 publisher actually does, and that's viewpoint
10:32:08 discrimination. It doesn't try to give a right of action
10:32:12 for the full panoply of various torts and other things
10:32:16 that publishers are subjected to in which that section of

10:32:20 230 insulates them from.

10:32:25 With respect to plaintiffs' other argument about
10:32:29 why 230 preempts H.B. 20, this is where they take issue
10:32:33 with our ejusdem generis canon argument. They say that we
10:32:46 don't offer up an argument for why otherwise objectionable
10:32:53 at the end of the various categories of speech that 230
10:32:57 says there will be a -- you can't bring a suit over, that
10:33:03 we don't explain what unifies those things.

10:33:06 Well, the Communications Decency Act, which 230
10:33:10 is a part of, is replete with other categories of content
10:33:18 that provide that unifying interest, and sort of at a meta
10:33:24 level, that unifying interest is really content. I think
10:33:29 that's all the time I have, your Honor.

10:33:32 THE COURT: I think I show you to have another
10:33:35 five minutes if you want to.

10:33:37 MR. LYLES: Okay. So I'll run through a few
10:33:39 other things that were not addressed up here but were -- I
10:33:44 would like to make.

10:33:45 THE COURT: Sure.

10:33:47 MR. LYLES: So the dormant commerce clause, it
10:33:49 only applies when, you know, there's dormancy. Here,
10:33:56 there is no dormancy. 230 regulates what we're talking
10:34:02 about, right, internet communications and moderating them,
10:34:07 and it does so with an explicit carve-out for state
10:34:12 regulation. So because, you know, there's no dormancy,

10:34:18 dormant commerce clause doesn't apply.

10:34:20 Also, the dormant commerce clause, at most, only
10:34:24 indirectly regulates commerce, which means that the
10:34:28 dormant commerce clause does not apply. And the Supreme
10:34:31 Court has made clear in a number of decisions, Lopez and
10:34:34 Morrison, that the dormant commerce clause analysis is not
10:34:37 sort of -- you can't just get in there if commerce is not
10:34:41 directly or more than indirectly affected. And as I just
10:34:49 argued, even if the dormant commerce clause applies, H.B.
10:34:53 20 does not violate it. Okay. That's all I have, your
10:35:19 Honor.

10:35:19 THE COURT: Thank you very much.

10:35:24 Mr. Keller, I show you have 23 minutes on the
10:35:33 clock.

10:35:34 MR. KELLER: Thank you, your Honor.

10:35:44 Governments have tried, time and time again, to
10:35:49 limit the First Amendment rights of private entities and
10:35:52 to compel speech. In many of the arguments you've just
10:35:55 heard, the Supreme Court has rejected, whether it's in
10:35:58 Tornillo or Hurley. But at base, I'll start very directly
10:36:03 because their primary argument is what they have called
10:36:05 the common carriage doctrine. There is no common carriage
10:36:09 doctrine that overrides First Amendment rights. They've
10:36:12 made it up.

10:36:16 The lead case that they cite for this proposition

about common carriage is a D.C. Circuit opinion, the U.S.C.A. case. The authors of that decision were judges Srinivasan and Tatel, and here's what they said in a statement concurring the denial of rehearing from en banc from their opinion. Quote, web platforms such as Facebook, Google, Twitter and YouTube are not considered common carriers that hold themselves out as affording neutral indiscriminate access to their platform without any editorial filtering.

They have terms of service that users have to sign up for when they crate an account. Those terms of service include content moderation policies that are exactly at issue. The idea that somehow covered platforms have been common carriers or accepting all indifferently is just factually inaccurate. I mean, think about adult content or pornography on most covered platforms. Think about not allowing users of certain ages or criminal histories or terrorist organization affiliations.

Also, congress in Section 230 expressly addressed this and allowed platforms to moderate content, to remove otherwise objectionable content. Whatever that phrase means and it should mean something that a platform subjectively considers to be offensive or inappropriate, definitely includes that. But whatever that means, it shows that platforms aren't common carriers.

10:37:44 And what you've heard from the defendant, before
10:37:51 I even get to their legal doctrine, think about the point
10:37:54 about YouTube removing 1.16 billion comments in three
10:37:59 months in 2021. How is that a common carrier offering
10:38:03 indifferent all-comer service is just a dummy pipe passing
10:38:06 speech through. That's not at all the case. On the legal
10:38:10 doctrine, they have proposed a open-ended multifarious,
10:38:16 multifactor test. The chief justice's controlling opinion
10:38:19 in Wisconsin Right To Life said the First Amendment must
10:38:22 eschew the opened-ended rough-and-tumble of factors. So
10:38:25 whatever this piece-together doctrine is about common
10:38:32 carriage, which no court has ever adopted as a basis to
10:38:34 overturn First Amendment rights, has to at least have some
10:38:38 grounding in precedent, but there is none.
10:38:40 Take Turner. I think Turner's a great case for
10:38:43 us. In Turner, the common carrier nature of a cable
10:38:50 company, intermediate scrutiny would still apply. The
10:38:53 defendant's saying no First Amendment scrutiny at all
10:38:56 should apply. In Turner, intermediate scrutiny applied,
10:38:58 and the only reason that statute was upheld was because of
10:39:01 the longstanding nature of federal government support of
10:39:04 broadcast television and 40 percent of Americans would
10:39:07 have lost that entire speech medium.
10:39:10 If an individual cannot go to a social media
10:39:15 platform and post exactly what speech they want to on this

10:39:17 private website, there are plenty of other opportunities
10:39:21 on the internet. As Reno vs. ACLU said, the internet is
10:39:24 not a scarce commodity. So there's not going to be this
10:39:29 destruction of an entire speech medium. Even under
10:39:32 defendant's test, plaintiffs are not common carriers. You
10:39:35 heard a lot about market power. Well, first of all,
10:39:39 Pacific Gas was a state-sanctioned monopoly. As much
10:39:44 market power as you could get. And the Supreme Court
10:39:46 vindicated Pacific Gas' First Amendment rights and said
10:39:50 you do not have to disseminate the speech on someone else.
10:39:53 That case squarely forecloses their argument.
10:39:55 But if you needed anything else, take Tornillo.
10:39:58 The same argument the defendant is making was rejected by
10:40:00 the Supreme Court in Tornillo. Tornillo said the First
10:40:03 Amendment protects even a, quote, noncompetitive and
10:40:06 enormously powerful company with a monopoly on the
10:40:11 marketplace of ideas.
10:40:13 Hurley said the enviable size and success of a
10:40:17 platform can't eviscerate First Amendment rights and
10:40:20 cannot show the platform has an abiding monopoly of access
10:40:23 to spectators. This comes back to the point the internet
10:40:27 has all sorts of ways to communicate. Individuals can go
10:40:30 to all sorts of different websites, various other social
10:40:33 media platforms.
10:40:33 They brought up the countervailing benefit issue.

10:40:37 First of all, this is no basis on which to overturn First
10:40:41 Amendment rights. But regardless, your Honor, I direct
10:40:44 you to 47 U.S.C., Section 223. Congress here disclaimed
10:40:49 any intent to treat platforms and websites as common
10:40:55 carriers. When they enacted Section 230, they were not
10:40:58 trying to impose common carriage liability. It would be
10:41:02 unconstitutional if they did try, but they didn't even
10:41:05 try.

10:41:07 The defendant has brought up, multiple times,
10:41:14 Justice Thomas' separate opinion in Biden vs. Knight, and
10:41:17 I will take that head on. First of all, that statement
10:41:19 was a cert stage, certiorari stage statement about a
10:41:24 different issue in which the Supreme Court vacated a lower
10:41:27 Court's opinion on mootness. Merits briefing was not
10:41:31 received.

10:41:31 And that statement by Justice Thomas, I think, is
10:41:33 revealing because at various times, this is not a
10:41:36 definitive statement that a particular doctrine does, in
10:41:39 fact, exist. Rather, it's saying, well, look, maybe
10:41:42 there's some market power issues regarding the lower
10:41:47 court's holding about whether an individual user that's a
10:41:50 government official could block other users from
10:41:54 retweeting or from commenting on that social media
10:41:59 platform. Well, these are private forums. And the issue
10:42:01 before the Court, even at that certiorari stage briefing,

10:42:05 was nothing at all like this as to whether government
10:42:06 could compel the dissemination of speech, whether
10:42:09 government could infringe editorial discretion and
10:42:12 certainly in a content-based way.
10:42:13 So whether we're talking about market power,
10:42:15 which we absolutely do dispute and that's in our reply
10:42:18 brief, but at base, to return to the Wisconsin Right To
10:42:22 Life opinion from the chief justice, we shouldn't have to
10:42:24 have an antitrust trial to retain our First Amendment
10:42:27 rights. First Amendment doctrines are supposed to be
10:42:31 clear, precisely to be able to resolve these issues
10:42:34 without getting into extensive discovery fights and
10:42:37 factual disputes.
10:42:38 When the state passes a content-based law,
10:42:40 indeed, a viewpoint-based law, they need a really good
10:42:45 reason. Strict scrutiny requires that because the First
10:42:49 Amendment does not allow government to come and tell
10:42:54 private entities what they can and can't do unless they
10:42:56 have a very good reason when it comes to expression and
10:42:59 dissemination of expression.
10:43:00 You heard defendant mention something about how,
10:43:03 well, social media platforms aren't adopting or agreeing
10:43:06 with the speech of their users. That's completely
10:43:09 irrelevant to the First Amendment analysis. I mean, think
10:43:12 about the number of entities in our society that

10:43:13 disseminate speech created by others. Tornillo was a
10:43:18 newspaper op-ed case about disseminating speech from
10:43:21 others. Pacific Gas was about a monopoly disseminating
10:43:24 speech in envelope mail inserts. Hurley was a case about
10:43:28 a parade organizer disseminating the speech of putative
10:43:32 parade participants. I could go down the list,
10:43:35 bookstores, book publishers, essay compilation editors,
10:43:37 theaters, newspaper letters to the editor, live television
10:43:41 guest interviews, cable television operators, picking
10:43:43 cable channels, art shows, community bulletin boards,
10:43:47 comedy clubs. They all have First Amendment rights. And
10:43:48 the theory that you're hearing today is the state can come
10:43:51 in and say: You're a common carrier. You now have to
10:43:55 disseminate the speech that the state wants. That is a
10:43:58 limitless theory of government power.
10:44:02 Coming to editorial discretion. I wrote this
10:44:05 down when it was said. You heard defense say, quote -- or
10:44:10 the platforms can, quote, continue to prohibit the content
10:44:14 you want to, unquote. And, your Honor, we're trying to
10:44:19 address this argument as directly as we can. The text
10:44:22 that the legislature passed in House Bill 20 says that we
10:44:26 cannot engage in viewpoint-based censorship, which is, you
10:44:30 know, blocking, banning, removing, de-platforming,
10:44:32 demonetizing, all these different words, treating
10:44:34 differently.

10:44:34 And I can't tell if the state is trying to argue
10:44:37 that the viewpoint-based problem with the statute goes to
10:44:42 the identity of the user as in, like, if you're a
10:44:45 registered democrat, you can't be treated differently.
10:44:48 I'm having a very hard time understanding exactly where
10:44:51 their argument goes. But the text of the statute says the
10:44:54 viewpoint of the user or another person, but it also says
10:44:56 the viewpoint represented in the user's expression. In
10:45:01 other words, this is not a situation where the law is only
10:45:08 a antidiscrimination law about identities of people. It
10:45:12 is going to the expression.
10:45:14 The state has tried to say, or at least defendant
10:45:19 has tried to say, that viewpoint-based is something other
10:45:25 than the Supreme Court and what the Fifth Circuit has
10:45:28 said. Now, they say that, well, maybe there's some fuzzy
10:45:32 lines. This is not fuzzy. R.A.V. vs. City of St. Paul is
10:45:35 directly on point. The statute there, the City of St.
10:45:38 Paul passed a hate speech law, and the Supreme Court said
10:45:40 this is not only content-based, this is viewpoint
10:45:43 discrimination.
10:45:44 Robinson, citing Mattel, it's the Fifth Circuit
10:45:47 citing the Supreme Court, said when the subjective
10:45:50 judgment is this is being made for -- that it is offensive
10:45:54 or inappropriate and that's why speech is being taken
10:45:57 down, that is a viewpoint-based judgment. Now, look, if

10:46:01 the defendant is trying to say that all content moderation
10:46:04 policies by covered platforms are valid, then why don't
10:46:11 they disavow enforcement of this statute? I mean, you
10:46:15 heard this litany of purported public harms, and yet,
10:46:18 they're also saying that, well, you can continue to do
10:46:21 exactly what you can do. That is not the text of this
10:46:24 statute. And I think defendant's position in its briefing
10:46:26 has only made the statute more vague than it already was.
10:46:29 Also, editorial discretion is completely
10:46:32 protected, even if it's fair or unfair or inconsistent.
10:46:37 The fair or unfair language comes from Hurley. The
10:46:39 inconsistent language comes from Thomas. Also, the fact
10:46:45 that this is a viewpoint-based law that says whenever a
10:46:49 platform would want to moderate content based on viewpoint
10:46:52 and the state steps in and says no, you must disseminate
10:46:56 that viewpoint, that only makes the law worse.
10:46:58 Viewpoint-based laws are presumptively unconstitutional.
10:47:02 Content-based laws trigger strict scrutiny.
10:47:05 Viewpoint-based laws are even worse and that's exactly
10:47:07 what we have here.
10:47:08 I'll also return to try to address this argument
10:47:12 about the example of the Nazi video that I mentioned
10:47:15 before. Take a video that's a speech of Adolf Hitler,
10:47:20 same content. In one context, if that viewpoint is
10:47:24 disseminating that speech to try to promote genocide and

10:47:27 Nazism, absolutely platforms can moderate that content,
10:47:33 and there's no way government can make them spread that
10:47:35 message.
10:47:37 Now, if the platform, same video but in context
10:47:41 is being spread because it's a documentary about World War
10:47:44 II, or it's speech trying to point out the atrocities of
10:47:49 the holocaust, well, then, maybe platforms can make --
10:47:52 they will make that determination possibly to disseminate
10:47:54 that. That's a viewpoint. It's the same content and in
10:47:59 one case, it's being disseminated, and in the other case,
10:48:02 it's being moderated. House Bill 20 prohibits that.
10:48:05 Also, the declarations are clear on how content
10:48:07 moderation works. I'd point your Honor to the Veitch
10:48:12 YouTube declaration, paragraphs 24 to 30, and the Potts
10:48:16 declaration, Facebook, paragraph 14 to 19.
10:48:20 Turning to the point about advertisers. A profit
10:48:26 motive is a completely legitimate motive. Also, too, you
10:48:31 heard from the defendants that, well, advertisers wouldn't
10:48:34 change their policies. That is completely incorrect. I'd
10:48:37 point you to the NetChoice declaration at paragraph 17.
10:48:41 What this provision says, in 2017, Google lost millions of
10:48:46 dollars in advertising revenue from YouTube after many
10:48:50 companies took down their ads after seeing them
10:48:52 distributed next to videos containing extremist content
10:48:55 and hate speech. And in 2020, very similar phenomenon

10:48:57 happened to Facebook. That's because the speech that is
10:49:00 disseminated on social media platform is absolutely being
10:49:03 identified and associated with the platforms themselves.
10:49:07 That was the express purpose of House Bill 20, as your
10:49:10 Honor has noted.
10:49:15 Coming to the disclosure provisions, you heard
10:49:18 from the defendants say that, well, the disclosure
10:49:21 provisions can be complied with in no particular fashion.
10:49:24 I don't know what that means. The platforms don't know
10:49:27 how to comply with these laws. What does having to turn
10:49:30 over all of your business practices and data content
10:49:33 management mean? You know, they say, well, this doesn't
10:49:37 include algorithms. They asked for platforms' algorithms
10:49:41 in discovery in this case.
10:49:49 You heard them mention that, well, YouTube has an
10:49:52 appeal process already. That's particularly misleading.
10:49:56 This is the YouTube declaration at paragraph 55. YouTube
10:49:59 does have an appeal process for videos that are being
10:50:02 moderated but not for comments. And House Bill 20 covers
10:50:05 not only videos, it covers all comments. And remember,
10:50:08 your Honor, in three months in 2021, YouTube took down
10:50:11 about nine million videos. Those would have went through
10:50:16 an appellate process. The 1.16 billion comments that were
10:50:19 taken down during that time, those weren't part of
10:50:22 YouTube's appellate process. The declaration here says

10:50:24 that YouTube would have to ramp up a 100X effort to comply
10:50:28 with these.
10:50:30 Also, you heard from the defendant that there was
10:50:32 no evidence, no evidence about the burden on this and that
10:50:39 complying with disclosure would be no big deal. The Potts
10:50:41 deposition, page 179, line 22 to page 180, 24, quote, what
10:50:48 I think would be impossible is for us to comply with
10:50:50 anything by December 1st, unquote. That is the deposition
10:50:53 testimony that they elicited.
10:50:59 On bad actors point, you heard about that. The
10:51:05 Rumenap declaration from the Stop Child Predators. Sorry,
10:51:09 the deposition, page 40, lines 10 to 8, listed that every
10:51:13 additional piece of information that bad actors get about
10:51:16 how social media platforms exercise editorial discretion,
10:51:20 engage in content moderation that provides, yet, more
10:51:23 insight to evade what editorial discretion is left.
10:51:28 Briefly on the commerce clause arguments, you did
10:51:31 not hear from the defendant any dispute that this would
10:51:33 compel platforms to continue operating in the state of
10:51:36 Texas. That is a commerce clause violation. You cannot
10:51:42 -- a government cannot drag a company unwillingly into a
10:51:47 state to then regulate it. You have to under the commerce
10:51:51 clause give a company the chance to leave if it wants to.
10:51:55 You also didn't hear any dispute that it compels
10:51:58 -- that House Bill 20 compels worldwide dissemination of

10:52:02 speech. Defendant attacks a straw man in saying that
10:52:07 somehow we're arguing that just because this is online, we
10:52:10 can't be regulated. No. It's the text of H.B. 20 that
10:52:12 extends the right not to just within the territorial
10:52:14 borders of Texas, but that viewpoint discrimination based
10:52:18 on any other user, even outside of Texas, that, all of a
10:52:22 sudden, that has to be disseminated and that there's a
10:52:26 hook between Texas users and speech across the globe.
10:52:30 That's the commerce clause problem.
10:52:32 On Section 230, the text of 233(e)(3) says no
10:52:36 cause of action shall be brought. That could not be more
10:52:38 clearer. A lawsuit cannot be brought. Whether the
10:52:41 lawsuit raises injunctive relief or damages relief, this
10:52:43 is another example. No court has ever adopted a position
10:52:48 trying to draw that line. Even then, on a plain text
10:52:51 reading of what a liability means, liability does not just
10:52:54 mean money damages. One is liable if they violate the
10:52:58 law, even if the remedy happens to be injunctive relief.
10:53:02 So basically, your Honor, House Bill 20's onerous
10:53:08 disclosure requirements and its requirement that platforms
10:53:12 would have to disseminate viewpoints that they do not want
10:53:15 to infringe editorial discretion under Hurley, Tornillo,
10:53:20 Pacific Gas, Manhattan Community. Reno vs. ACLU says the
10:53:25 internet's not any different. In fact, the internet gets
10:53:28 full protection. Distinguishing this case from Turner.

10:53:30 This is a content-based law, a speaker-based law, indeed,
10:53:33 a viewpoint-based law. All of that triggers strict
10:53:37 scrutiny. The vagueness of this law has only heightened
10:53:40 in the context of seeing defendant's opposition to the
10:53:43 preliminary injunction motion.
10:53:45 The defendants have not posited a sufficient
10:53:50 governmental interest recognized by the Supreme Court.
10:53:52 They're making up this common carriage doctrine that has
10:53:55 no basis in law that no court has ever adopted. This is
10:53:58 not properly tailored. The government could have created
10:54:00 its own social media platform. The government did not
10:54:06 have to draw a statute that only swept in platforms of 50
10:54:08 million or more active monthly users, excluding others.
10:54:13 That's favoring some social media platforms and it's
10:54:15 disfavoring. And all you have to do is look to the
10:54:18 enactment history as to why that was. This is not about
10:54:21 disseminating all speech. This is about platforms
10:54:25 perceived to have bias and the government reacting against
10:54:28 them. The First Amendment does not allow that.
10:54:31 And, your Honor, I would just end with this. You
10:54:35 heard from the defendant today that they expect extensive
10:54:40 discovery in this case. This is, yet, another way in
10:54:45 which government is trying to use its power to chill First
10:54:49 Amendment rights. What discovery do we need to determine
10:54:54 whether Hurley, Tornillo and Pacific Gas protect the

10:54:56 editorial discretion of social media platforms? Reno vs. ACLU already said it.

10:55:03 10:55:05 What possible factual discovery do we need to determine whether this made-up common carriage doctrine can override First Amendment rights when Pacific Gas involved a monopoly and its First Amendment rights were vindicated? What facts do we need to determine whether this is content-based law? We can look on the face of the law. What facts do we need to determine whether the two interests that they have posited are rejected by the Supreme Court? What possible facts do we need to know whether Section 230 preemption applies? These are purely legal questions.

10:55:33 10:55:35 And as I mentioned before, the loss of First Amendment freedoms for even an instant is per se irreparable injury. The state has no sufficient interest in enforcing an unlawful law. And injunctions upholding First Amendment rights are always in the public interest. We would ask your Honor that you preliminarily enjoin Section 2 and Section 7 of House Bill 20 before they take effect later this week.

10:55:56 10:56:00 If there are no further questions, we'd ask for that relief. Thank you, your Honor.

10:56:01 THE COURT: Thank you. All right.

10:56:08 Before we close out, is there any need to

10:56:11 supplement the record? Or is everything in the record
10:56:15 that needs to be?
10:56:20 MR. DISHER: Yes, your Honor. Thank you. Todd
10:56:20 Disher for plaintiffs.
10:56:21 We have filed all of the exhibits that we are
10:56:23 relying on in our moving for preliminary injunction, in
10:56:26 addition to citing to the exhibits filed by the
10:56:29 defendants.
10:56:30 THE COURT: Very good. Anything additionally
10:56:31 from the state?
10:56:32 MS. CORBELLO: Nothing further to supplement,
10:56:33 your Honor.
10:56:33 THE COURT: Okay. Very good. Thank you very
10:56:34 much. All right.
10:56:35 This has been very helpful. Thank you very much.
10:56:37 I know this is an issue of great importance. And
10:56:40 especially keeping in mind the timelines involved, I've
10:56:45 tried to accommodate the need for discovery and limited
10:56:50 discovery in the case with the urgency of having this
10:56:53 decided. I appreciate very much your arguments today and
10:56:58 your previous briefing. I will take this under
10:57:01 advisement. I will do my best to get something out one
10:57:06 way or the other expeditiously, but obviously there are
10:57:09 important issues that need careful consideration. So all
10:57:12 I can do is tell you, as always, we will do our best and

10:57:16 thank you all very much.

10:57:18 MR. KELLER: Thank you, your Honor.

MS. CORBELLO: Thank you, your Honor.

(Proceedings concluded.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

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/s/Lily I. Reznik
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